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THE
Old Burying Ground Case.

1888.

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A HISTORY

OF THE

OLD BURYING GROUND

AS CONTAINED IN THE CASE OF

THE ATTORNEY-GENERAL

AGAINST

THE CITY OF NEWARK

"

1888.




NEWARK, N. J.:

WARD & TICHENOR, PRINTERS, 832 & 834 BROAD STREET.

1888.

F144
:N6N66

In Chancery of New Jersey.

<i>Between</i>		
JOHN P. STOCKTON, ATTORNEY-GENERAL,		
AND OTHERS,		
<i>Complainants,</i>		<i>On</i>
<i>and</i>		<i>Bill, &c.</i>
THE MAYOR AND COMMON COUNCIL OF THE		
CITY OF NEWARK,		
<i>Defendants.</i>		

*To the Honorable THEODORE RUNYON, Chancellor of the
State of New Jersey :*

Informing, sheweth unto you Honor, John P. Stockton, Attorney-General of the State of New Jersey, on the information of Henry Congar, Samuel H. Pennington, Jabez P. Pennington, Ira M. Harrison, Henry N. Parkhurst, William R. Alling, Jeremiah D. Poinier, Bruen H. Camp, Alexander Johnson, Augustus Dusenberry, John P. Dusenberry, Horace Alling, James Bruen, Frank Tichenor, Ernest E. Coe, John C. Mandeville, citizens of the city of Newark, in the county of Essex, and heirs and descendants of the old settlers of the town of Newark, now said city, who act herein for the benefit of all such citizens, heirs and descendants as may be made parties and contribute to the expense hereof, and for the protection of the charitable use hereafter mentioned ; and also humbly complaining, show, the said individuals named as such citizens, heirs and descendants, who file this their bill for the benefit aforesaid, and in order to the protection and enforcement aforesaid,

I. That shortly after the settlement of said town, on the tenth day of December, 1696, the Proprietors of the Province of East New Jersey, in pursuance of the prem-

ises of their concessions to actual settlers thereof, theretofore made by them, did by their deed of that date, recorded in the Proprietors' office at Perth Amboy, in Book F of Proprietary Records, on pages 166 to 168, and to which reference is hereby prayed, grant to John Curtis, John Treat, Theophilus Pierson and Robert Young, of said town, with other lands therein described, a certain tract of land in the then town, now city of Newark, therein described as follows, to wit :

"Secondly, all that small tract therein allotted for the burying place, taking in the pond and meeting-house, being seven chains in length and four in width, bounded west by John Treat, south by John Johnston, north and east by highways."

Which tract by its boundaries is somewhat larger than by above measurements, and which grant was made to said grantees in said deed and their heirs, to the only proper use, benefit and behoof of the old settlers of the town of Newark, their heirs and assigns forever in common, and granted to be and remain for said use therein expressed, and to be appropriated to no other use or uses whatever ; all of which, by reference to said deed, will appear.

II. That part of said premises occupied by the pond and meeting-house, now constitutes land occupied by buildings on Broad and Market streets in said city, being the highways referred to in said grant, but that the bulk thereof, bounded by the rear of said buildings and the lots whereon they stand, and by Halsey street, then and thereafter was used for and devoted to use for interment and a burial place of the people of said town, otherwise known as the settlers thereof, being the old settlers, their heirs and assigns, and has been reserved and kept for that purpose and been known as the Old Burying Ground of the town of Newark ; and therein have been buried from time to time thence hitherto deceased persons,

people of said town as aforesaid, old settlers and their heirs and descendants, and there their monuments and memorial stones have been erected and placed, and many of them now remain.

Said use was and is a charitable use, within and according to the laws of this State.

III. That afterwards and about the 15th day of February, 1804, an act of the legislature of New Jersey was passed for the purpose of vesting the legal estate held by said trustees or their heirs, but upon the same trust and charitable use contained in said original deed, and it is hereby charged and shown that the said trust and charitable use were thereby confirmed and established, and all the obligations incumbent by said deed upon the trustees therein named were laid upon the inhabitants of the township of Newark, and were by said township accepted and undertaken, which said statute (to which reference is prayed,) was to the effect and in the words following, to wit :

LAWS OF 1804. (Page 255.)

AN ACT to vest in the Inhabitants of the Township of Newark, in the county of Essex, a certain estate now in the hands of Trustees.

Whereas, the inhabitants, first settlers of the town of Newark, in the county of Essex, on their first settlement after purchasing all the lands lying in the bounds of said town of the native Indians, proceeded to parcel out the same among themselves and such settlers as thought proper at various times to settle in said town, according to the rules and regulations established by the first settlers respecting their admission, at the same time reserving certain portions of land in various parts of said town for public purposes, and doubts having arisen in respect to the validity of the Indian title, it was afterwards thought advisable by the inhabitants of the said town of

Newark to take a grant from the proprietors of East New Jersey for the confirmation of their rights to the said public land, and as the inhabitants of the said town were not incorporated by law, and were incapable of taking a legal estate, it was thought advisable to take the said grant in the name of certain trustees for the use of the said inhabitants, which grant was accordingly taken on the tenth day of December, in the year of our Lord one thousand six hundred and ninety-six, in the name of John Curtis, John Treat, Theophilus Pierson and Robert Young, to have and to hold to them, their heirs and assigns forever, to the only proper use, benefit and behoof of the old settlers, the town of Newark aforesaid, their heirs and assigns forever, in common granted to be and remain to and for the several uses therein particularly expressed, and to be appropriated to no other use or uses whatsoever; and, whereas, the original trustees are all dead, and the heir of the survivor not known to be a resident in the said town of Newark, nor even in the said county of Essex; and, whereas, through the ignorance of those infant times, the use created in the said grant, although really meant and intended for the benefit of the inhabitants of the said town of Newark and their successors, yet it being so inartificially expressed as to render it difficult for the present inhabitants of the town of Newark, as incorporated by law, to assert their rights to the said premises, by means of which the lands contained in the said grant and originally reserved by the first settlers for public purposes are exposed to encroachments and other injuries, without a competent remedy either in law or equity to prevent and punish the same; for remedy whereof,

SEC. 1. BE IT ENACTED *by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same*, That the trust estate vested in John Curtis, John Treat, Theophilus Pierson and Robert

Young, their heirs and assigns forever, by a certain deed or patent granted by the proprietors of East New Jersey, bearing date the tenth day of December, in the year of our Lord one thousand six hundred and ninety-six, to them the said John Curtis, John Treat, Theophilus Pierson and Robert Young, their heirs and assigns forever, for the only proper use, benefit and behoof of the old settlers of the town of Newark aforesaid, their heirs and assigns forever, shall henceforth cease and be void.

2. *And be it enacted*, That henceforth the estate so as aforesaid vested in John Curtis, John Treat, Theophilus Pierson and Robert Young, their heirs and assigns forever, be vested in the inhabitants of the township of Newark, in the county of Essex, as incorporated by law, and their successors forever, and they are hereby vested with the legal title to the same as fully and absolutely as though they had been originally named in the said grant, in the place of the said John Curtis, John Treat, Theophilus Pierson and Robert Young, their heirs and assigns; *saving*, nevertheless, the right or rights of any *bona fide* purchaser or purchasers for valuable consideration, without notice of the said trust of the said John Curtis, John Treat, Theophilus Pierson and Robert Young, their heirs and assigns.

Provided also, that nothing herein contained shall in any way extend to or affect the parsonage lands contained and particularly described and expressed in said grant; and also such parts of the burying ground mentioned and described in said grant as have either been leased or sold by the trustees of the First Presbyterian Church in Newark, previous to the first day of January last; and also the ground on which the market in the said town of Newark now standeth.

3. *And be it enacted*, That the estate hereby vested in the inhabitants of the township of Newark as aforesaid shall be appropriated and forever remain to and for the

several uses in the said original patent aforesaid expressed, and for no other use or uses whatsoever.

Passed at Trenton, February 15, 1804.

The inhabitants of said township of Newark were afterwards, to wit, about the year 1836, incorporated by said legislature, under the name of The Mayor and Common Council of the City of Newark, and thereupon by force of the laws of this State, the said Mayor and Common Council of the City of Newark became subject to all the responsibilities theretofore belonging to the inhabitants of the township aforesaid, and succeeded to the duties of said trustees aforesaid.

IV. And the said Attorney-General informing shows, charges and insists, and said complainants show and charge, that while the said township of Newark and its successors, The Mayor and Common Council of the City of Newark, thereby obtained the legal title to the said lands constituting the said Old Burying Ground, and likewise to the dead bodies of those buried therein, and their grave-stones and memorials as therein placed, that by the laws as well as by the universal feeling of mankind, there was imposed upon them a duty to be discharged towards the dead—a duty and a right to protect the same from violation, removal or desecration. That while holding said legal title and having charge of the same they cannot be considered the owner in any sense whatever, but hold it as a sacred trust for the benefit of all who from family, inheritance or fellowship in the same community have an interest in it, and that a court of equity will regulate said ground as such, and control the custody thereof if improperly managed; that the right of the said the Mayor and Common Council of the City of Newark over the same and over the bodies of the worthies and old settlers of Newark and others therein buried, is not to make of the same an article of traffic or

profit, but that it is a sacred right to preserve its custody and secure the undisturbed repose of the persons there interred, according to decency and the universal feeling of mankind, and that in case of the breach of said duty, equity will give and only can give a full and complete remedy, and that this Court has full and complete jurisdiction of the matter, and will protect said burying ground and the remains and memorials of those interred within it from desecration and from removal, and compel the maintenance of said burial place according to the original trust.

That the relators above named are heirs by descent of said old settlers named in said original deed of trust; their ancestors, old settlers, as aforesaid, lie buried in said burying ground; they are likewise citizens and inhabitants of said city of Newark and taxpayers therein, interested in the proper distribution and use of the revenues thereof; and they submit that they are *cestuis que trust* under said original deed and entitled to make application to this Court for the enforcement of the trusts thereby created according to their true tenor and effect, and for preventing the abandonment of the charitable use aforesaid to which said land is thereby devoted.

And the said Attorney-General on the relation aforesaid informing, and your orators the said complainants, further show that nevertheless The Mayor and Common Council of the City of Newark, disregarding their said trust and sacred duty in that behalf, have not only neglected to care for the said ground, and for years suffered encroachment to be made thereon, paths to be made through the same, and that the same should become a common haunt for vagrants and persons of evil habits by day and night, a disgrace to the city and a shocking grief to those whose family and friends are there buried, but also have lately resolved by resolution of their Com-

mon Council to use said ground as a common and public market for the sale of meats and vegetables, and to let it out for hire for that purpose; and that said resolution was the execution of a purpose conceived as long ago as June last, when with that purpose in view they secretly and unjustly procured the passage of an act of this State as follows, that is to say:

“An Act to authorize the cities and other municipalities of this State to devote to other public use lands held for burial purposes, and to make provisions for the removal and protection of the remains interred therein.

“Be it enacted by the Senate and General Assembly of the State of New Jersey, That where lands held by the cities or municipalities of this State for burial purposes are or may be affected by any trust that they shall be devoted to that use, and in the judgment of the Common Council or other governing body the public good will be served by devoting such lands to other public uses, it shall and may be lawful in every such case to use such lands for any public purpose or use to which, in the judgment of the Common Council or other governing body, they are best adapted.

“2. And be it enacted, That in case interments have at any time been made on such lands or any part thereof, the Common Council or other governing body shall cause the remains so interred to be removed to some suitable and proper burial place, and make proper and reasonable provision therefor, and for the protection thereof, and to this end may make such reasonable appropriation of public moneys as may be necessary.

“3. And be it enacted, That this act shall take effect immediately.

“Approved June 29, 1886.”

And the said Attorney-General informing on the relation aforesaid, and the said complainants complaining, show that the said act was introduced into the legislature at an extra session thereof, and at a late day therein, when an adjournment was daily expected, and was gotten through with unusual rapidity; that the same was in reality a private, special and local act within the meaning of the constitution of this State; that there are no other cities or municipalities within this State which hold lands for burial purposes than the city of Newark; that no public notice was given of the intention to apply for said act, or of the object thereof; that the passage of said act was forbidden by the constitution of this State, because of the want of such public notice, and because said act vacated public grounds.

And the said Attorney-General informing as aforesaid, and said complainants show that in and through the premises, and especially through the said act of the said year eighteen hundred and four, and the acceptance thereof by the said township of Newark, to which the said Mayor and Common Council of said city have as aforesaid succeeded, a contract was made with the then inhabitants of said township, and a trust was thereby assumed by said township and *impressed* upon said premises, that the same should be thereafter forever held for the use of a burial place for old settlers of Newark, their heirs and assigns, and the citizens, and for no other purpose whatever; that the said act of one thousand eight hundred and eighty-six, authorized the impairing of said obligation, and the abrogation of said trust; that it was beyond the constitutional authority of the legislature to authorize said city of Newark to abandon such trust and solemn contract, and to take and use said lands upon which it was as aforesaid imposed, for lucre and gain or otherwise than according thereto; that the bodies interred in said burying ground and the monuments,

gravestones and like memorials of the dead there situated, were respectively the property of the parties by whom they were deposited or erected, and their legal representatives; that the legislature has no constitutional right to take the said property, remove it and devote it to any other use, public or private. And it is hereby submitted in behalf of and by said Attorney-General informant, and of said relators complainants, the said act of the legislature of 1886 was, and is unlawful and void, and affords no justification for any departure from the execution of their said trust on the part of said The Mayor and Common Council of the City of Newark.

And said Attorney-General in said relation as aforesaid, and said complainants further show that, notwithstanding the premises, the Common Council of the city of Newark passed a resolution or ordinance which is alleged by them, notwithstanding that the same did not receive the signature or sanction of the Mayor of said city, to have become legally operative, by which the said burial ground was ordered to be appropriated and used hereafter for the use and purpose of a public market place for the accommodation of hucksters, butchers and others in the sale of vegetables, meats and the like, and that the remains of the persons therein buried should be taken thence, together with the monuments and tombstones erected to their memory, and should be removed to some other place to be determined upon by a committee of said Council by them appointed and designated; and said The Mayor and Common Council of the City of Newark, by their servants and agents in that behalf, are now engaged or about to enter upon the work of digging up the ground of said burial place, in order to the taking therefrom the bodies there buried and carrying them thence in preparation for arranging said burial ground for the purpose of a market as aforesaid.

All which conduct on the part of said The Mayor and Common Council of the City of Newark aforesaid is contrary to good conscience and tends to the injury and wrong of the State and of many of the citizens thereof, and of the relators and complainants herein.

In tender consideration whereof, and to the end therefore that said The Mayor and Common Council of said City of Newark, defendants in this suit, may answer the premises, and that it may be adjudged and decreed by this Honorable Court that the said premises were granted in the year one thousand six hundred and ninety-six, and dedicated to the charitable use of a burial place for the old settlers of said city of Newark, their heirs and assigns, inhabitants of said city, and can be lawfully used for no other purpose whatsoever, and that said act of the legislature of New Jersey, passed in eighteen hundred and eighty-six as aforesaid, is unconstitutional and void, and confers no right upon said defendants to appropriate the same to any other use or purpose; and that they should be enjoined and restrained therefrom and from removing the remains of persons buried there, their tombstones and other monuments from said burying ground to any other place of sepulture, and that they, the said defendants, may be compelled by the order and decree of this Court hereafter to maintain and keep the said burying ground in a decent and proper manner, so as to protect the remains and memorials whatsoever of the dead there interred from desecration, and as befits the purpose of said grant and dedication; and that your Honor would grant such other relief as shall be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant to the said the Attorney-General, informant as aforesaid, and to your orators, not only the State's writ of injunction, to be directed to the said defendants and their agents, thereby restraining and enjoining them as

by this information and bill prayed, but also the writ of subpœna, to be to said defendants directed, commanding them to appear before your Honor in this Honorable Court, at a certain time and place therein to be named, then and there to answer the premises, and to abide by and perform such order and decree herein as to your Honor shall seem fit and agreeable to equity and good conscience.

CORTLANDT & WAYNE PARKER,

*Solicitors for the complainant and relators, and of counsel
for the informant, relators and complainants.*

In Chancery of New Jersey.

<i>Between</i>	
JOHN P. STOCKTON, ATTORNEY-GENERAL, AND OTHERS,	} <i>Complainants,</i>
<i>and</i>	
THE MAYOR AND COMMON COUNCIL OF THE CITY OF NEWARK,	} <i>Defendants.</i>

On Bill, &c.
Answer.

The answer of The Mayor and Common Council of the City of Newark, defendant, to the information or bill of John P. Stockton, Attorney-General, and others, complainants:

1. This defendant, for answer to the said bill, states that as to the matters set forth in the said bill or information, this defendant expressly denies each and every of the allegations thereof, except in so far as the same are admitted or set out herein, and in so far as the same are not hereinafter admitted or set out, this defendant prays that the complainants may be put to their proof thereof.

2. And this defendant, further answering, says that in the month of May, sixteen hundred and sixty-six, what is now known as the city of Newark was first settled upon and occupied by persons who had that year emigrated hither from Connecticut, and that at the time of the said settlement, or within a short time thereafter, the said emigrants, who are now known as the early or old settlers, organized themselves into a regular independent government, but as this defendant believes, they acknowledged an allegiance to and in some way were subject to

the government of Great Britain, which then claimed sovereignty over all the territory included within the boundaries of the State of New Jersey. That shortly after the place of the said settlement had been determined and was located, it was laid out by the said early or old settlers into lots or plots, which they called home lots, which they divided among themselves and upon which they settled, as appears by the record thereof which they then made and which has since been preserved.

3. And this defendant, further answering, says that at the time of the said settlement, the said early or old settlers seized upon the said lands and took possession thereof, without the leave or license of any person whatsoever. That prior to that time the said lands were wild and uncultivated, and were occupied and enjoyed only by the native Indians as hunting grounds, and had never been tilled or put to any useful purpose. That at the time the said early or old settlers entered into possession of the said lands they claimed the same, both in common and in severalty, as their own by the right of possession and occupation, but that in order to secure a more perfect title and a better right to the lands of which they had taken possession, they very soon after their settlement and sometime during the year sixteen hundred and sixty-six, made a bargain with the said native Indians, by which the said native Indians conveyed to them all the lands which they had so occupied, and that subsequently and on the eleventh day of July, sixteen hundred and sixty-seven, for the purpose of securing a more perfect title and of enlarging and perfecting the said deed of sixteen hundred and sixty-six, they procured from the said Indians a second deed covering also the whole of the said lands, which was afterwards confirmed by a third deed from the Indians, dated on the thirteenth day of March, sixteen hundred and sixty-seven. And this defendant

says that in and by said deeds the said native Indians conveyed all the lands now included within the limits of the city of Newark, to Obediah Bruen, Samuel Kitchell, Michael Tompkins, John Brown and Robert Denison, to them, their heirs and associates forever, to have, hold and dispose of without claim, let or molestation from the said native Indians, who in and by the said deed are recognized and named as the true proprietors and owners of the said lands and premises therein described.

4. And this defendant, further answering, says that under the said original right acquired by settlement and possession as aforesaid, and under the deeds so obtained as aforesaid from the Indians, who had formerly been in possession of the said tract of land, the said early or old settlers and those who became associated with them had the unmolested and unrestricted right, title, use, occupation and enjoyment of the said lands, and claimed the same by reason of such occupation and use, and of the title so obtained. That they laid out a town site within the bounds of the lands which were conveyed to them by the said native Indians, and called the same the town of Newark. That in said town site they laid out certain streets and squares and public places, and that they made allotments among themselves of lands for individual use, reserving the streets, squares and public places for the common benefit of all the inhabitants of the town. That among the other portions so marked out and allotted was a tract of land now lying near the corner of Broad and Market streets in the said city of Newark, which was set apart for a church and burial place. And this defendant shows that the said tract of land lay on the west side of what is now called Broad street, and the south side of what is now called Market street, and was about seven chains in length along Broad street, and about four chains in width along Market street, and that it was bounded on the north and east by the aforesaid

highways, on the west by a lot allotted to John Treat, and on the south by a lot allotted to John Johnson. And this defendant says that by virtue of the premises and of the original agreement made by the said early or old settlers with each other, the above described lot and every part thereof was the common property of all the inhabitants of the said town, and that they all had a common interest and a common ownership therein, and that such common rights were conceded and yielded to all the inhabitants of the said town.

5. And this defendant, further answering, says that soon after the said settlement was made there was erected upon the said tract of land on the Broad street side, the only building in the said town for purposes of religious worship, and in accordance with the original design of the said old settlers, the bodies of all members of the settlement who died were there buried. And this defendant says that from the earliest times all the inhabitants of the said town had a lawful right to enter upon the said tract and into the said building for the purpose of divine worship and for the purpose of interring their dead, and that there was no person or congregation of persons who had any right to refuse the same to any inhabitant of the said town.

6. And this defendant, further answering, says that the form of government established by the said inhabitants of the town of Newark was a pure democracy, in which all the persons living in said settlement who had a right to vote were obliged to participate. That they kept and preserved the record of all the proceedings had at the regular and special meetings of the inhabitants, which were called town meetings, in a book which is called the town book, and which has been so kept and preserved since the earliest settlement. That in said town book are many references to the tract of land now in dispute, and many references to the manner in which the old set-

tlers held and claimed to hold the title to the lands which they occupied and enjoyed. And this defendant says that the said town book is now in the possession of this defendant, and that so far as the same contains any matters relevant to the issue in this suit, this defendant prays that it may refer thereto, or to the printed copies thereof issued by the New Jersey Historical Society.

7. And this defendant, further answering, says that the form of local self-government originally adopted by said town, as above set out, was continued and carried on by the inhabitants thereof until the twenty-seventh day of April, seventeen hundred and thirteen, when all that tract of land then known by the name of Newark, and including the disputed tract, was created into a township by metes and bounds, to be known by the name of The Trustees of the Freeholders and Inhabitants of the Township of Newark, by royal patent, which appointed the first trustees thereof, and that thereafter and until the year seventeen hundred and ninety-eight, the government of the said territory was conducted under the authority of that charter. That in the last named year the said territory was created into a body politic and corporate in law, by the name of "The Inhabitants of the Township of Newark, in the County of Essex," and so continued until the year eighteen hundred and thirty-six, when the said territory was incorporated as a city by the name of "The Mayor and Common Council of the City of Newark."

8. And this defendant, further answering, says that from the earliest settlement of the town of Newark, the tract of land now in dispute, or portions thereof, was used as a burying ground, and that interments were made in it from time to time of the bodies of persons who were inhabitants of the said town, and that for many years it was the only burial place within a convenient distance of the said settlement, but that whether the government was by the early inhabitants under their original consti-

tution and agreement, or under royal charter, or under the authority of the legislature of New Jersey, the said disputed tract of land has always been considered to be, and always has been common and public property, and has always been used by the public in common, and that the public had the exclusive control over and custody of the same, as will more fully appear by the proceedings in relation thereto, entered in the said town book; and that among other things, as early as the year seventeen hundred and thirty-five, at a town meeting held by the inhabitants of the said town of Newark, it was resolved that the said burying place should be let out for pasture for cows; it was so let out for pasture by the votes of the inhabitants in town meeting assembled, for many years thereafter and until the year eighteen hundred and fifteen, when the same was prohibited by a resolution passed in town meeting, and that whatever was done in relation to the old burying ground was made a matter of public business at the town meetings, and whatever moneys were expended thereon was expended from the public funds.

9. And this defendant, further answering, says that the early or old settlers of the said town of Newark always assumed and supposed that the title to the lands so occupied and possessed by them depended upon their actual and adverse possession thereof, but that they recognized the fact that the native Indians who had occupied and enjoyed the same before them had some sort of uncertain right therein, and that it was only for the purpose of strengthening their right, as against the said native Indians, and for the purpose of establishing friendly relations with them, that they negotiated with the said Indians for the title to the said lands, and took from them the deeds above mentioned. And this defendant says that they did not recognize the Proprietors of East Jersey as the owners of the soil occupied by them, but held

adversely to the said proprietors, and that this is fully shown by the proceedings taken by the said inhabitants in their several town meetings, as is shown by the entries in the said town book. That very soon after the said settlement was begun the Proprietors of East Jersey laid claim to the lands occupied by the then town of Newark, and attempted to induce the inhabitants thereof to recognize their claim and title, and to pay to the proprietors quit rents at the rate of one-half penny a year for every acre of land occupied by the said inhabitants; that the demand for the payment thereof was made a matter of public notoriety and of public business, and was resisted stoutly in public and in private. That so far as this defendant has been able to learn a demand was made upon the inhabitants by the Governor of the Board of Proprietors as early as the year sixteen hundred and sixty-nine, and that in reply to said demand, on the thirteenth day of February, sixteen hundred and sixty-nine, it was resolved by the said inhabitants, in town meeting assembled, that they would hold and possess their lands and rights in the said town, both by civil and divine right, as by their legal purchase and articles doth and may show, "and as for the payment of the half-penny per acre for all our allotted lands according to our articles, and interpretations of them, you assuring them to us, we are ready, when the time comes, to perform our duty to the lords or their assigns." But this defendant says that the demand so made was not complied with, and that the Proprietors of East Jersey did not at that time secure from the said inhabitants any recognition of their title, nor any rents for the lands occupied by them, nor of the lands held by them in common as aforesaid.

10. And these defendants, further answering, say that the settlement of the town of Newark aforesaid was originally made with the full knowledge of the Board of Proprietors, and in fact by their procurement and with their

consent ; that in sixteen hundred and sixty-five they formulated and made public a governmental constitution, which they called "The Concession and Agreement of "the Lords Proprietors of the Province of New Cæsarea, "or New Jersey, to and with all and every the Adventurers, and all such as shall settle or plant there," in which they offered large inducements to settlers within the province, and that it was in consequence of the inducements and promises therein set out that the said early or old settlers came from Connecticut to New Jersey to form their said settlement. And this defendant says that at the time of the said settlement the Proprietors of the Province of East Jersey were John Berkeley and George Carteret, who claimed to hold the title to all the land within the then province of New Jersey, by virtue of a royal patent granted by Charles the Second, King of England, to James, Duke of York, who conveyed or attempted to convey his interest and title therein by deed of lease and release to the said Berkeley and Carteret. And this defendant says that the said proprietors, Berkeley and Carteret, in the year sixteen hundred and sixty-four, by commission, under their hands and seals, appointed Philip Carteret, governor of the said province of New Jersey, during their will and pleasure, and that by an instrument in writing under the hands of said two proprietors, they gave to said Philip Carteret full and absolute authority to let, sell, convey and assume the lands which they claimed in New Jersey to any or all persons who should settle thereon. And this defendant says that the said Philip Carteret was fully cognizant of the said settlement, and in every way in his power assisted therein ; that he assisted the said early settlers in their negotiations with the native Indians by writing them letters, and sending messengers to them to secure their friendship, and to aid the said early settlers in procuring the title to the said lands from them. And this defendant says that

the deeds hereinabove mentioned were procured from said native Indians with the full knowledge and consent of the said Philip Carteret, and that when the last of the three Indian deeds, which was confirmatory of the other two, came to be made, the execution thereof was acknowledged before the said Philip Carteret, who was present at the execution thereof and was assisting therein. And this defendant says that the action of the said Philip Carteret therein was, so far as the said early settlers and the lands occupied by them were concerned, an abandonment of any pretended title of the said proprietors therein, and that they took the same, including the lands now in dispute, freed therefrom.

And this defendant, further answering, says that the said inhabitants were and had been in actual custody, possession and enjoyment of the said lands held by them in severalty and in common, including the tract of land now in dispute, for upwards of thirty years before any instrument or deed was made by the said proprietors for the said lands or any portion thereof, during which time the public had used the said burying ground and the lands adjacent thereto for the public uses of worship and burial of the dead, and had acquired a title thereto by possession and occupation, which was adverse to the title of the proprietors of the said land and every part thereof.

11. And this defendant, further answering, says that the Board of Proprietors of East Jersey, for the purpose of confirming and making certain the title of certain of the lots which had been so settled upon and occupied by the old inhabitants, on or about the tenth day of December, sixteen hundred and ninety-six, made, executed and delivered to John Curtis, John Treat, Theophilus Pierson and Robert Young, of the said town of Newark, a deed of conveyance for several tracts of land, among which are the premises in dispute, and therein described as follows:

“ All that small tract allotted for the burying place, taking in the pond and meeting house, being seven chains in length and four chains in breadth, bounded west by John Treat, south by John Johnson, north and east by highways.”

And that in and by said deed the said grantees were to have and to hold the said lands to the only proper use, benefit and behoof of the old settlers of the town of Newark aforesaid, their heirs and assigns forever, in common, and that the said lands were granted to be and remain for the several uses herein particularly expressed, and to be appropriated for no other use or uses whatsoever. And this defendant says that at the time the said deed was made, acknowledged and delivered, the inhabitants of the town of Newark were in actual possession of the lands thereby granted or intended to be granted, and that as a matter of fact and as a matter of law, the said deed was merely confirmatory of the title which the said inhabitants had already acquired in the said lands. That the said deed was made to the trustees therein named, for the reason that the inhabitants of the town of Newark were not incorporated, and as a body could not take the title thereto, but that it was not intended that the said deed should impose an unalterable trust upon the said lands, or impress upon them a perpetual use, but that on the contrary thereof, the words in the said deed which are relied upon by the complainant to establish the said use, are merely words of description, and are inserted in the said deed for the purpose of denoting the use to which the inhabitants of the said old town had put the said lands, and to designate them with absolute certainty.

12. And this defendant, further answering, says that from and after the making of the said proprietors' deed, the said lands continued to be used by the public in the same manner and to the same extent as theretofore, and

that in consequence of the doubts which had always existed as to the right and title of the public in the said lands, and for the purposes of quieting the title thereto, the legislature, on or about the fifteenth day of February, eighteen hundred and four, passed an act, set out in the third paragraph of the bill of complaint herein. And this defendant states and charges the fact to be that by virtue of that enactment all prior disputes as to the legal title to the said lands were settled ; that thereby the township of Newark became and was vested with the legal title to the tract of land now in dispute and with full control thereof, and that in pursuance of that act the said township of Newark, and afterwards the city of Newark, have had the legal title to and the possession of the said plot, and have of right exercised full and absolute control over the same, and that subject to such limitations as were by that act put on their power in relation thereto, the said township and this defendant had a lawful right and the full authority to take such measures as were expedient for the care and custody of the said grounds, and the preservation of the remains and monuments therein contained.

13. And this defendant, further answering, says that the said old burying ground now lies in the heart of the city of Newark, and is surrounded by the most populous and most valuable portion of the city ; that no interments have been made therein for many years, and that on account of the peculiar situation and location of the land the same has now and long since had become unsuitable for burials ; that originally the whole plot was used in common by the people resident in the town for the purposes of worship and interment, but that as the land grew more and more valuable for business purposes, encroachments were made on the Broad and Market street fronts, which are now with a small exception covered by business buildings, in which large amounts of money are

invested ; that in making such encroachments, the persons who claim to be owners of the said buildings, have actually erected buildings upon portions of the said land in which interments have been made, and that it has been impossible for this defendant to protect the said premises from desecration ; that it has been and is now open to the common use of the public, and is used as a rendezvous for immoral persons, and as a depository for rubbish and dirt, and for a long time has been a public nuisance ; and this defendant says that by virtue of its general control over the said grounds, and in pursuance of the terms of the act of 1886, it has determined that the general good of the community, and all considerations of respect for the memory of the early settlers of Newark, whose bodies are buried there, require that the use to which the said premises have been so long devoted should be determined, and that proper measures should be taken to care for the remains of the said deceased persons, and to perpetuate their memories.

14. And this defendant, further answering, says that in pursuance of such determination, proper resolutions and ordinances to carry the same into effect were passed, after much public agitation of the questions involved, in and by the Common Council, in the public press, and by the public generally, and that this defendant prior to the filing of the bill herein, appropriated the sum of eight thousand dollars to purchase a plot in the city of Newark, in which to re-inter the said remains, and to procure a suitable monument to perpetuate the memories of the said deceased persons, and to enable this defendant to decently remove and properly re-inter the said bodies ; and that this defendant at the time of the filing of the bill had begun the task of the removal of said bodies, and had expended large sums of money in and about the said work, all of which will be lost unless this defendant shall be allowed to proceed therewith. And this defend-

ant says that the question of the advisability of the removal of the said bodies has been the subject of public discussion for several years past in the Common Council and in the newspapers, and that in the opinion of the Common Council the time has now come when such a removal has become necessary. And this defendant says that only a small portion of the present population of the city of Newark have, by reason of the burial of their ancestors therein, any interest in the said burial ground, and that it is manifestly for the benefit of the public at large that the said land should be put to some use to which its situation and location in the city make it more applicable than to burial purposes.

15. And this defendant, further answering, says that the Common Council of the City of Newark has full discretion under the act of eighteen hundred and eighty-six, in the management and control of the said burying ground; that all that it has done or is about to do, and all the resolutions passed and adopted by the Common Council in relation thereto, are within the powers conferred by that act. And this defendant insists that this Court has no jurisdiction to enjoin this defendant or its servants and agents from removing the said bodies or from fully performing the work in that behalf which has been already begun.

16. And this defendant, further answering, denies the allegations of the said bill in regard to the manner in which said act of eighteen hundred and eighty-six was passed; and it denies that the same was introduced at an extra session of the legislature, and was hurried through with great rapidity, though if said allegations were true this Court is incompetent to make any inquiry into the same. But, on the contrary, this defendant says that this act was introduced and passed at an adjourned session of the legislature, and that the advisability of the passage of such a law was publicly discussed by the people of the

city of Newark, by newspapers, and by the Common Council, for months before the act was introduced into the legislature, and that the act in the form in which it now is was asked for by this defendant in its corporate capacity, in the firm belief that it is an expression of the wish of the people of the city in relation to the said matter. And this defendant denies that the said act of eighteen hundred and eighty-six is special or local in its character, or that it violates any of the provisions of the constitution; but this defendant says that the said act is general in its character and objects, and is within the police power of the legislature. And this defendant says that after the said act had been passed by the legislature it went to the Governor for his approval, and was held by him for a long time, during which, this defendant is informed, the relators, or some of them, objected to the form and purpose of the act to the Governor, and presented to the Governor oral and written arguments against the same, and that after the Governor had heard all objections he refused to approve the act until he had seen the land, and that he came to Newark for that purpose, and made a personal inspection of the land in dispute, and subsequently signed his approval of the measure.

17. And this defendant, further answering, says and admits that the Common Council of the city of Newark did pass a resolution providing for the use for the present of the said lands as a place for the sale of country produce from wagons, but this defendant says in relation thereto that for many years past it has been customary to allow such produce to be sold from wagons along the line of Broad street, one of the principal thoroughfares of the city, and that the city authorities have not, and because of the great expense could not provide any other place therefor at the present time; that this Court by its injunction restrained this defendant recently from allowing said business to be carried on in the public streets of the

city, and that it was in consequence of such injunction that the Common Council decided to appropriate the old burying ground to market purposes as aforesaid. But this defendant shows that such use was only intended to be a temporary expedient, and was expressed so to be in the resolution passed by the Common Council in relation to the matter, and that it is the intention of this defendant eventually to purchase and provide in some other part of the city a plot of land suitable for a country produce market, and that then the plot of land in dispute will be relieved therefrom.

17½. And this defendant, further answering, says that many years ago it became evident that it was not to the interest or advantage of the public that any further interments should be made in the said old burying ground, and the question of discontinuing the same was publicly discussed in the regular town meetings held by the inhabitants of the township of Newark, and that in furtherance thereof the township authorized its officers to purchase a new burying ground, and that such purchase was made in the year eighteen hundred and twenty-eight or thereabouts, with the public money, and that afterwards and on the thirteenth day of April, eighteen hundred and twenty-nine, a resolution was passed by the town meeting held on that day that in future no more interments should be made in the old burying ground, and that notice of the resolution should be given by the town committee in the newspapers printed in the town. And this defendant says that after the passage of the said resolution the use of the old burying ground for the purpose of interring the dead was practically, if not absolutely discontinued, and that since then there have been no interments therein.

And this defendant charges and insists that the ground which had thus been devoted by the people to burial purposes had become wholly unsuitable for this purpose,

and that it was the right and duty of the town authorities to discontinue interments therein, and that it subsequently became necessary, for the protection of the health of the city, the preservation of public morals, as well as for the protection of the remains of the dead buried in these grounds, that they should be removed to a more suitable place for interment; and being authorized by the legislature to make such removal, this defendant charges that it has full power and authority to do so without regard to the question of title. That neither the old settlers or their descendants had any private rights in these grounds, or any rights arising out of contracts, and that the public authorities of the city had the right to remove the remains deposited therein whenever in their judgment the public good required it.

18. And this defendant, further answering, says that among the other tracts of land which were intended to be conveyed by the Proprietors of East Jersey to John Curtis and others, by their deed hereinabove set out, was a tract of land described as follows:

“Another triangle peece Alotted for a watering place for cattle, Begining at John Plum’s corner and running up the brooke west seaven chaines; thence east and by north seaven chaines to the highway, and at the east end one chaine three rodes, bounded south by John Plum, and Robert Daglish, North and East by highways.”

The title to which was vested in the inhabitants of Newark by the aforesaid act of eighteen hundred and four; and this defendant says that the tract of land so allotted for a watering place for cattle was, by the said deed and the said act of the legislature, the property of the township of Newark aforesaid, and was in the same situation as was the tract of land in dispute in this cause, and that in order to enable the inhabitants of the township of Newark to sell the same, the legislature of the

State of New Jersey, on the twenty-eighth day of November, eighteen hundred and nine, passed an act entitled "An act to enable the inhabitants of the township of Newark, in the county of Essex, to sell a lot of land therein mentioned," of which the following is a copy :

"Whereas, it is represented to the Council and General Assembly, that a certain lot of land lying and being in the town platt of the township of Newark, in the county of Essex, known by the name of the watering place, is not at this time, nor has it been for many years last past, used for the purpose for which it was originally appropriated, nor is it any longer wanted for that use, and that the inhabitants of said township are desirous of selling the same, and disposing the money arising from the sale thereof to some other public use, and that as the law now is the said inhabitants have not authority, without legislative aid, to sell the same ; And whereas, application hath been made to the Council and General Assembly in behalf of the inhabitants of the said township, in conformity to vote of the said inhabitants of the said township, passed at the annual town meeting in April last past, for the law to enable them to sell and dispose of said land in fee simple ; therefore,

"SEC. 1. Be it enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same, that the inhabitants of the township of Newark, in the county of Essex, are hereby authorized and empowered to sell and dispose of in fee simple, a certain lot of land lying and being in the town platt of the township of Newark, in the county of Essex, which lot is included in a grant from the Proprietors of East New Jersey, to John Curtis, John Treat, Theophilus Pierson and Robert Young, for the use of the old settlers of the town of Newark, bearing date the tenth day of December, in the year of our Lord one thousand six hundred and ninety-six, in which grant the said lot of

land is denominated a 'watering place for cattle,' and is described as a triangular piece, bounded south by John Plum and Robert Daglish, and east and north by highways. The legal title to the said lot of land among other lands contained in the said grant, being vested in the inhabitants of the said township of Newark, in the county of Essex, as incorporated by law, a certain act of the legislature of the State of New Jersey, passed the fifteenth day of February, in the year of our Lord eighteen hundred and four.

"2. And be it enacted, That it shall and may be lawful for the members of the township committee of the said township of Newark, in the county of Essex, for the time being, they being thereunto hereafter authorized by a vote of the inhabitants of the said township of Newark at an annual meeting, to execute under their respective hands and private seals, in the name of the inhabitants of the said township of Newark, proper deed or deeds of conveyance in fee simple to the purchaser or purchasers of said land, which deed or deeds of conveyance so made and executed shall convey to and vest in the purchaser or purchasers all the right, title and interest of the inhabitants of the said township of Newark, of, in and to the said land forever.

"3. And be it enacted, That the monies arising from the sale of the said land shall be laid out and expended by the township committee of the said township of Newark for such public permanent purposes, in the town platt of the said township of Newark, after paying to the town committee of the township of Orange such proportionable part of five hundred dollars heretofore expended in law-suits for the recovery of the before mentioned town lands, as shall appear to have been paid by the inhabitants residing in the district now the township of Orange, and formerly a part of the township of Newark, aforesaid, to be ascertained on comparing the duplicates of

rateables of each of the said townships of Newark and Orange of the present year, eighteen hundred and nine, as the inhabitants of the said township of Newark in an annual or other lawful town meeting shall order and direct, on ten days' notice having been given in the public papers printed in the said town of Newark, of an intended motion to be made in said town meeting for that purpose, pointing out the particular object of the said motion, provided that the inhabitants of the said township of Newark in lawful town meeting assembled, may in case they shall think proper so to do, apply five hundred dollars, including the payment to the township of Orange as aforesaid, out of the monies arising on the sale of the poor, or other lawful expenditures of the said township, that sum having been heretofore expended by the said township in law-suit respecting the said land."

19. And this defendant says that by virtue of the said act, the town committee of the said township of Newark divided the said watering place into suitable sized lots and sold the same for the sum of fifteen hundred dollars, and made title thereto to the several purchasers thereof. And this defendant says that the said plot of land known as the watering place, was held by the public in the same manner in which the said tract of land in dispute was then held, and is now held, and that no one ever questioned the right of the legislature or of the township authorities to make the disposition of the said tract which they did make. And this defendant says that the action of the legislature and of the public in relation to that land is a precedent for what is now claimed by this defendant in this suit, and is a practical construction of the rights of the public in relation thereto, and that it is not now competent for the Attorney-General or for the relators named in the bill of complaint herein to question the same, or to interfere with the action of this defendant, which has been determined on as aforesaid. And this defendant,

further answering, says that the legislature of this State in the exercise of its sovereign power, has full right to discharge any lands which have been devoted to special or particular public uses, and to authorize a change in the use thereof, and that the legislature of this State has exercised this right, and has authorized the sale of lands held not only by the public but private corporations for particular uses, freed and discharged from any trust in a great number of instances, as will appear by a reference to the public laws of this State, published by the authority of the State, to which this defendant begs leave to refer. And this defendant, further answering, says that the exhibit hereto annexed marked "A," shows the "Home Lots" of the old settlers as they were laid out and allotted as shown by the town records or town book before referred to, and the lot set apart for a burial place now called the "old burying ground," which lot is thereon designated as lot "A," and that Exhibit "B," hereto annexed, which is made from actual surveys and measurements, shows the "old burying ground," as it now is, with the encroachments that have been made thereon; that the part thereof colored in blue is now in the possession and occupation of persons or corporations, claiming to be the owners thereof, and to have absolute right and title thereto; that the names of the persons claiming such title and ownership are shown thereon, as far as this defendant has been able to learn the same, and that lines indicating their present possessions are correctly shown on said exhibit.

And this defendant further shows, that the ground thus occupied and claimed by said persons covers a large part of the tract originally set apart for the burial place, as shown on Exhibit "A," and that as matter of fact the buildings erected on these lots, so owned and claimed, occupy a part of the ground in which interments were formerly made, and that in making excavations for the

said buildings, the remains of bodies interred in what was originally set apart for a burial place by the old settlers, as before stated, have been removed in many instances.

And this defendant, further answering, says that it has no knowledge, except from said bill, whether the relators are, or whether any of them are heirs or descendants of any of the old settlers, and leaves them to make such proof thereof as they may be advised is necessary; but this defendant says that if they are such heirs, that they have by virtue of their relationship no right in the premises as *cestuis que trust* or otherwise, and that they have no standing in this Court as complainants or relators.

And this defendant, further answering, says that the Attorney-General has no standing in this Court as the representative of the State, to seek to enjoin this defendant as prayed in the said bill; that the State has by its legislature given to this defendant express authority to do the acts complained of, and can only revoke this authority or interfere with its exercise by an act of the legislature. And this defendant prays that it may have the same benefit of this defence as if it had demurred to the said bill.

This defendant, therefore, claims that it is proceeding strictly according to law; that it is not violating any private right, or neglecting any public duty in what it has done or proposed to do in the premises, but that in the removal of these remains, and their decent and proper interment in a suitable and proper place, it is moved by considerations alike respectful to the dead, whose bones have been so long neglected and insulted, and to the living, in removing what has long since become a public nuisance; and it prays that it may be hence dismissed with costs.

JOSEPH E. HAYNES, *Mayor*. [L. S.]

JOSEPH COULT, *City Counsel*.

Attest:

S. H. PEMBERTON, *City Clerk*.

In Chancery of New Jersey.

FEBRUARY TERM, 1887.

<hr/> <i>Between</i> JOHN P. STOCKTON, ATTORNEY-GENERAL, AND OTHERS, <i>v.</i> THE MAYOR AND COMMON COUNCIL OF THE CITY OF NEWARK. <hr/>	}	<i>Opinion.</i>
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Bill for injunction. On order to show cause upon bill and answer.

Messrs. CORTLANDT & WAYNE PARKER, for relators.

Mr. JOSEPH COULT, for defendants.

THE CHANCELLOR: This suit is brought by the Attorney-General by information, at the relation of Henry Congar and others, and by the relators as complainants, against The Mayor and Common Council of the City of Newark, to establish a trust in certain land in Newark, known as "The Old Burying Ground," and to restrain the defendants from removing from that land the remains of persons buried there, and to compel the defendants to keep and maintain the ground in decent and proper order so as to protect the remains and memorials therein from desecration. The bill states that the relators and complainants are citizens of Newark, and heirs and descendants of the old settlers of the town of Newark, and they bring suit not only for themselves but also for the benefit of all such other citizens, heirs and descendants as may be made parties, and for the protection of the charitable use to which the burying ground was, as they allege, devoted.

The bill states that on the tenth of December, 1696, shortly after the settlement of the town, the Proprietors of the Province of East New Jersey, in pursuance of the concessions to actual settlers thereof theretofore made by them, granted to John Curtis, John Treat, Theophilus Pierson and Robert Young, of the town of Newark, certain parcels of land in Newark for public use, among which was a tract including the land in question, which tract is described in the deed as "all that small tract therein allotted for the burying place, takeing in the pond and meeting house, being seaven chaines in length and foure chaines in breadth, bounded west by John Treat, south by John Johnson, north and east by highways;" that as to that land the grant was made and was in the deed declared to be made, to the grantees and their heirs, to the only proper use, benefit and behoof of the old settlers of the town of Newark, their heirs and assigns forever, in common, and that it was also therein declared that the land was granted to be and remain for the use in the deed expressed and to be appropriated to no other use or uses whatever. The complainants allege that the greater part of that tract was then and thereafter used for and devoted to the use of a burial place for the people of the town, those who settled the place, the old settlers, and their heirs and assigns, and that it has been reserved and kept for such purpose, and has been known as "The Old Burying Ground," and that there have been buried in it from time to time deceased persons, people of the town, old settlers, and their heirs and descendants, and that the memorials of such deceased persons have been erected there, and that some of them still remain; that about the fifteenth of February, 1804, the legislature of the State, for the purpose of vesting the legal estate in the property upon the same trust and to the same use upon and to which it had been granted, passed an act by which it was recited that the inhabitants, the first settlers of Newark, on their first

settlement, after purchasing all the lands lying within the bounds of the town of the native Indians, proceeded to parcel them out among themselves and such settlers as thought proper at various times to settle in the town, according to the rules and regulations established by the first settlers respecting their admission, at the same time reserving certain portions of land in various parts of the town for public purposes; and that doubts having arisen as to the validity of the Indian title, it was afterwards thought advisable by the inhabitants of the town to take a grant from the Proprietors of East New Jersey for the confirmation of their rights to that public land, and that as the inhabitants of the town were not incorporated, and were incapable of taking a legal estate, it was thought advisable to take the grant in the names of certain trustees for the use of the inhabitants, which grant was accordingly taken on the tenth of October, 1696, in the names of John Curtis, John Treat, Theophilus Pierson and Robert Young, to have and to hold to them, their heirs and assigns forever, to the only proper use, benefit and behoof of the old settlers of the town, their heirs and assigns forever, in common, (the lands) granted to be and remain to and for the several uses therein particularly expressed, and to be appropriated to no other use or uses whatsoever; that the original trustees were all dead and the heir of the survivor not known to be resident in Newark, and that through the ignorance of those infant times the use created in the grant, although really meant for the benefit of the inhabitants of the town of Newark and their successors, yet was so inartificially expressed as to render it difficult for the then inhabitants of the town, as incorporated by law, to assert their rights to the premises; by means whereof the lands contained in the grant, and originally reserved by the first settlers for public purposes, were exposed to encroachments and other injuries without a competent remedy therefor, either in law or

equity, and it was thereby enacted that the trust estate vested in the trustees, their heirs and assigns forever, by the deed from the proprietors, for the only proper use, benefit and behoof of the old settlers of the town of Newark, their heirs and assigns forever, should thenceforth cease and be void, and that the estate so vested in those trustees, their heirs and assigns forever, should be vested in the inhabitants of the township of Newark, in the county of Essex, as incorporated by law, and their successors forever, and that they were thereby vested with the legal title thereto as fully and absolutely as though they had been originally named in the grant in the place of the original trustees, saving the rights of *bona fide* purchasers, without notice of the trust; provided that nothing in the act should in any way extend to or affect the parsonage lands described in the grant, or such parts of the burying ground as had been leased or sold by the First Presbyterian Church in Newark, before the first of January then last, or the ground upon which the market then stood. And it was thereby further enacted that the estate vested by the act in the inhabitants of the township should be appropriated and forever remain to and for the several uses in the before mentioned original patent (the deed from the proprietors) expressed, and for no other use or uses whatsoever. The bill further states that in eighteen hundred and thirty-six the city was incorporated, and thereupon, by force of the laws of this State, became subject to all the responsibilities of the township and succeeded to the duties of the inhabitants of the township as trustees; that it thus obtained the legal title to the land in question, and that it was its duty to protect and preserve the property to the uses to which it was originally devoted, but that it has not only neglected its duty in that behalf, but now proposes to remove the remains from the ground and devote the land to use as a public market, for the sale of meat and vegeta-

bles, and to let it out for hire for those purposes accordingly, and that its action in the matter is under an act of the legislature passed in eighteen hundred and eighty-six, and obtained by the city itself, by which it was enacted that where lands held by the cities or municipalities of this State for burial purposes, are or may be affected by any trust that they shall be devoted to that use, and in the judgment of the Common Council, or other governing body, the public good will be served by devoting such lands to other public uses, it shall and may be lawful in every such case to use such lands for any public purpose or use to which in the judgment of the Common Council, or other governing body, they are best adapted ; and that in case interments have at any time been made in such lands, or any part thereof, the Common Council or other governing body shall cause the remains so interred to be removed to some suitable and proper burial place, and make proper and reasonable provision therefor and for the protection thereof, and to that end may make such reasonable appropriation of public moneys as may be necessary.

The bill attacks that act upon the ground that it is really a private, special and local law within the meaning of the constitution, and alleges that there are no other cities or municipalities in this State, except the city of Newark, which hold land in trust for burial purposes ; that no public notice was given of the intention to apply for the act nor of the object of it, and that the passage of the act was forbidden by the constitution of this State, because of the want of such notice and because the act vacates public grounds.

The answer states that first settlers came in May, 1666 ; that soon after they came they laid out the land of which they had taken possession without leave or license, claiming it by occupation, and divided it among themselves into what they called home lots ; that in order to secure a

more perfect title they bought the land from the Indians and took from them three conveyances therefor, one in 1666, and the others in 1667; that in laying out the town site they reserved streets, squares and public places for the common benefit of the people of the town; that among the portions so allotted was the tract set apart for a church and burial place, and that that was common property; that soon after the settlement the only building for religious worship in the town was built upon the property, and that in accordance with the original design of the settlers the bodies of all the settlers who died were there interred, and that the property was common to all the inhabitants—the meeting house for worship and the burying ground for interment; that up to 1713 the form of government of the town was a pure democracy, in which all who lived in the settlement and were entitled to a vote were obliged to participate; that in that year the inhabitants of the tract then known as the town of Newark were incorporated by royal patent, by the name of the “Trustees of the Freeholders and Inhabitants of the Township of Newark,” and the government was thence forward to 1798, carried on under that charter; that in the last mentioned year the township was incorporated, and that the city was incorporated in 1836; that from the earliest settlement the land in dispute or portions thereof were used as a burying ground and interments were made in it from time to time of the bodies of persons who were inhabitants of the town, but that it was always common property under the control of the public; that the settlers denied the right of the Indians, although they took the before mentioned deeds from them, and they denied the right of the proprietors, and they held possession for over thirty years before they took from the proprietors the deed mentioned in the bill, which they took as a merely confirmatory conveyance; that it was not intended that that deed should impose any unalter-

able trust upon the property in question, or impress upon it a perpetual use, but the answer alleges the words relied upon in the bill to establish the use are merely words of description, denoting the use to which the inhabitants of the town had put the land, and were used in order to designate them with absolute certainty; that after the making of the deed of the proprietors the land continued to be used by the public in the same way and to the same extent as before that time, and that in consequence of the doubts which had always existed as to the right and title of the public thereto and to quiet the title, the act of 1804 was passed; that subject to such limitations as were by that act put upon its power, the city had a lawful right and full authority to take such measures as were expedient for the care and custody of the grounds, and the preservation of the remains and monuments therein; that the tract lies in the heart of the city, and is surrounded by the most populous and valuable portion of the city; that no interments have been made there for many years, and that on account of the peculiar situation and location of the property it has now become unsuitable for burials; that originally the whole of it was used in common by the people of the town for purposes of worship and interment, but as the land grew more and more valuable encroachments were made upon the Broad and Market street fronts, which are now, with a small exception, covered with business buildings in which large amounts of money are invested; that in making such encroachments the persons who claim to be the owners of the buildings have actually erected them upon parts of the land in which interments were made, and that it has been impossible for the city to protect the property from desecration; that it has been and is now open to the common use of the public, and is used as a rendezvous for immoral persons and as a depository for rubbish, and for a long time has been a public nuisance, and that by virtue

of its general control over the grounds and under the terms of the act of 1886, the city has determined that the general good of the community and all considerations of respect for the memory of the early settlers of Newark, whose bodies are buried there, require that the use to which the premises have been so long devoted should be determined, and that proper measures should be taken to care for the remains of those deceased persons, and to perpetuate their memories ; that the city proposes to reinter the remains to be removed in an appropriate place and erect a suitable monument over them ; that it proposes to occupy the land for a market, but only temporarily, and that it intends to get another place for such market hereafter and to relieve the land in question from use as a market place.

It is evident from the foregoing full statement of the main contents of the pleadings that the city has no title to the land in question except such as it may have under the act of 1804, and the charter which provides that the Mayor and Common Council and their successors shall, by virtue of their charter, become and be absolutely and completely vested with, possess and enjoy all the lands, tenements, hereditaments, property, rights, causes of action and estate whatsoever, both in law and equity, in possession, reversion or remainder, which at the time of the passing of the charter were vested in the township as a corporation, according to such estate and interest as the township as a corporation at the time of the passage of the charter had or of right ought to have therein. *P. L. 1836*, p. 185, and *P. L. 1857*, p. 117. If the title to the land was held by the township under the act of 1804, merely in trust for the purposes of the charity, (use as a burial ground,) the city holds it in like manner and upon the same trust. But it is urged by the answer that the city holds it irrespective of the act of 1804, as public property generally, without the impress of a trust

or devotion to any particular use upon it. This claim cannot be sustained. How did the city get title if not under the act of 1804? And what title has it except such title?

Before that act the title was in the grantees under the deed from the proprietors or the survivors or survivor of them, or the heir at law of the last survivor. If it be conceded that the Indian title is valid, the city has no title to the land under it.

If the land was dedicated to public use as a burying ground by the old settlers, the power of the city over it under such dedication is only for the protection and regulation of the public use. It cannot sell the land nor release or extinguish the use for which the land was dedicated, nor employ it in any way variant from the purposes for which it was designed. *Trustees, &c., v. Hoboken*, 4 Vroom, 13. Under the act of 1804, the title was vested in the township as a corporation, to be appropriated and forever remain to and for the several uses expressed in the deed from the proprietors, and for no other use or uses whatever.

The city, if it took the title under that act and its charter, took it subject to that provision and with that trust impressed upon it. In *Montpelier v. East Montpelier*, 27 Vroom, 704, it was held that land held in trust by the original town of Montpelier did not pass to the new towns of Montpelier and East Montpelier, created out of the territory of the original town, (the Court held that by force of the provisions of the act the original town ceased to act,) although the act provided that all property then owned and possessed by the original town should be thereafter owned and enjoyed by the new towns in certain proportions. The city then, if it holds the title in trust, holds it for the use of the property as a burying ground and for no other use whatever, unless the act of 1886 has given it the power to abolish the use.

That act is an act to destroy the trust. If it be conceded that there is no valid objection to it on the grounds mentioned in the bill, (a subject which it is not necessary to pass upon at this time,) and the act be regarded as a general law, it may be characterized as an enactment empowering the municipal authorities at will to destroy the trusts in all such cases. As such, it is in my judgment unconstitutional. It is not within the power of the legislature to abolish such trusts as that on which the city, if it has title to the old burying ground, holds that property. It is established law that if a grant is made to a municipal corporation charged with a trust in favor of an individual, private corporation or charity, the interest which the *cestui que trust* or beneficiary has under the grant, may sustain it against legislative revocation; a vested equitable interest being property in the same sense and entitled to the same protection as a legal interest. *Cooley Const. Lim.* 278. In *Montpelier v. East Montpelier*, 29 Vroom, 12, it was said that grants of property to municipal corporations in trust for other purposes than corporate and municipal use, are no more the subject of legislative control than are the private and vested rights of individuals. It is urged on behalf of the city that this act may be supported under what is known as the police power of the legislature, by virtue of which it may, to protect the health of the public, exercise directly or by delegating it to the municipality, the power of directing the removal of bodies from a graveyard. It is enough to say on this head that the act is not an exercise of that power. According to the answer it may be remarked, no interments have made in the ground in question for nearly sixty years.

The act provides that when lands held by the cities and municipalities of the State for burial purposes are or may be affected by any trust that they shall be devoted to that use, and in the judgment of the Common

Council or other governing body, the public good will be served by devoting such lands to other public uses, it shall and may be lawful in every such case to use such lands for any public use to which, in the judgment of the Common Council or other governing body, they are best adapted.

This is not a grant based upon the power to prevent or abate nuisances, but construed as the defendants construe it, it is a gift of power to the Common Council or other governing body to put (entirely at their discretion) land granted to the municipality in trust for burial purposes, whether located in or out of the city or municipality, to any or other public use to which they may think it best adapted, and that, too, without reference to any consideration of the public health to justify it. Nor can it justly be claimed that in view of the fact that no interments have been made for so long a period (since 1829) the use has ceased. The object of burial is not to put the dead away temporarily merely, but to place them in a final resting-place.

When land is given in trust for a burial place it obviously can by no means be said that the trust is at an end when the last body which can be buried in it has been deposited. The expectation in the burial of the dead is that they are to remain permanently, and the unauthorized disturbance of their remains is regarded with abhorrence as a desecration, and is criminal.

In *Campbell v. Liverpool*, L. R. 9 Eq. A trust for a burying place devotes the ground to the perpetual repose of the remains of the dead. It dedicates it to uses of the most sacred character. The burying ground is God's acre. 579, by act of Will. 3, land belonging to the parish of Liverpool was set apart and dedicated to the use of a burial ground, and by the sentence of consecration the corporation renounced all right to the land. In 1854 the ground was closed against burials by an order in council.

In 1866 the corporation being authorized to take a part of the ground under an improvement act refused to pay for the land to be taken, on the ground that the land reverted to the corporation on the closing of the ground against burials, and that on such closing the use came to an end : it was held that the land had been dedicated forever to the use of a burial ground, that there was no reverter to the corporation, and the Court would, if necessary, presume a conveyance of the legal estate.

See also *Moreland v. Richardson*, 24 Beav. 33. Manifestly the fact that the place in question has become a nuisance from the neglect by the city of its duty to take proper care of it is no reason why it should now be permitted to go still further and destroy the use altogether. By an act of March 3d, 1848, (P. L. 1848, p. 152,) the fact that the city had authorized or permitted encroachments upon the ground was recognized, as also the fact that it derived revenue for such encroachments, and it was provided that it should be the duty of the Mayor and Common Council to protect and preserve the ground as then enclosed and the enclosures thereof. It may be added that the nuisances mentioned in the answer are all of them such as the city may prevent.

An injunction will be allowed according to the prayer of the bill.

A charitable use, derived from the public, vested in trust in a municipality, it also being the beneficiary, may be transmuted to other municipal purposes, with the sanction of the legislature.

If the trustee of a charitable use be about to alienate or transform the property so as to carry into effect, in the most reasonable manner, the object of the grant, such act will not be enjoined.

New Jersey Court of Errors and Appeals.

MARCH TERM, 1888.

THE MAYOR AND COMMON COUNCIL OF THE CITY OF NEWARK,	}	<i>Opinion of Chief Justice.</i>
<i>Appellants,</i>		
<i>and</i>		
STOCKTON, ATTORNEY-GENERAL, <i>et al.</i> ,	}	
<i>Respondents.</i>		

The facts of the case will be found fully stated in the opinion of the Chancellor.

JOSEPH COULT, for appellants.

CORTLANDT PARKER, for respondents.

BEASLEY, *Ch. Justice*. For the purpose of perspicuity it is necessary to define the status of those who appear upon the record as the promoters of this proceeding.

The bill purports to be exhibited as an information by the Attorney-General, at the instance of sundry private prosecutors, and yet, although wearing this plainly public aspect, it was sought to sustain the suit, in part, on the basis of the existence of purely private rights of property. The prosecutors both in the bill and in the arguments of their counsel, were presented to the Court as

the defendants and heirs of the "old settlers of Newark," whose bodies rest in the burying ground in question, and it was contended that these "old settlers," and the prosecutors by privity of blood, were the owners of the disputed premises for the purposes of sepulture.

But this position is conspicuously untenable. If it were well founded it would, in toto, confound the present procedure, for the Attorney-General, in view of such a case, would have no place in it; the suit of itself would fall to pieces for want of coherence between its incongruent parts.

But, in truth, when we look beneath the surface of the case there does not appear the least semblance of private ownership in these parties. The claim was founded on the fact that the deed from the proprietors vests this property as a place of burial in trust for the "old settlers" of Newark, it being averred that such "old settlers" were a definite class of persons, and the Court was referred to the town records where they were named.

But this construction is based on an unwarranted assumption; it treats the description of the *cestui que trust*, as a fixed number of individuals, as much so as though designated by name. Such an interpretation seems illegitimate, for it converts the phrase, "old settlers" into the entirely different phrase of "first settlers." If one could go outside of the terms of the deed and look for the intention of the parties, the inference would be strongly against the idea that the purpose was to give the benefit of the grant to the original founders of the town alone. The first inhabitancy appears to have occurred about the year 1666, and this trust deed was taken in 1696; and it cannot, therefore, reasonably be presumed that it was the design of those who were inhabitants at this later period to invest those of the earlier period with the entire benefit of the land thus acquired. Such inhabitants might well understand that the expression, "old settlers," em-

braced them as well as those settlers who had somewhat the precedence of them in point of time.

The truth is, this description of the *cestui que trust* in this instrument, instead of being thus demonstrative of a fixed class of persons, is in fact so indefinite as to its beneficiaries as to raise grave doubts with respect to the legal efficacy of the grant itself. Regarding the conveyance as an attempt to create either a private estate or a public charity, the intended recipients of the beneficial interests must, in the first case, be demonstrably certain, and in the latter capable of ascertainment. But who can say who the "old settlers of Newark" were? Were they those who became inhabitants during the first month of the settlement, to the exclusion of those who became such during the second month? Or does the description embrace those who settled there in the first year, but not the incomers of the next year?

But it is not necessary further to press this inquiry, for it is certain that, if these prosecutors had succeeded in establishing that their ancestors, being a definite number of ascertained persons, together with their heirs, were the exclusive beneficiaries of this use of the property in question, they would have demonstrated the absolute worthlessness of this deed from the proprietors. It is very plain that when land is conveyed in fee to certain persons and their heirs to be used forever as a burial place, that thereby a charitable use is not created. In order to constitute such latter interest the objects of the gift must be indefinite. It has been said that a public charity begins where uncertainty in the recipients begins. 2 *Perry on Trusts*, Sec. 687. Such gifts are sustained for the reason that they enure to the public benefit. But a donation to certain named persons and their heirs is altogether a private concern, to be tested and regulated by the ordinary rules of law. When land is devoted forever to a use that the law recognizes as a charitable one, the transaction is

sanctioned and sustained ; but when so devoted to a private use, it is absolutely repudiated, being deemed hostile to that important rule of public policy that prohibits the fettering of property beyond certain prescribed limits. The language of the books is, that "A trust cannot be created that will suspend the absolute ownership of the property for a longer time than that allowed by law. A perpetual trust cannot be created for an individual and his heirs in succession forever ; and herein a charity differs, for a trust may be established which contemplates the payment of the income of a certain fund to some charitable purpose forever."

In view of this thoroughly established principle, it is clear that there can be found no legal basis for this bill in this claim of a private right in this land vested in the prosecutors.

Nor is the case in this respect strengthened by the fact that the bodies of the ancestors of these prosecutors were permitted to be buried in this cemetery. Such a circumstance does not confer on the descendants of such persons the right to intervene and prevent the property from being devoted, when necessity or convenience calls for it, to other purposes. The cases are numerous and uncontradictory settling the law in this way, so that it is superfluous to refer to them or to discuss the subject. Many of them have been collected in the brief of the counsel of the appellee.

It was deemed that this branch of the controversy presented no question of difficulty, and it has been thus briefly considered in order to eliminate it from the discussion of the real point that calls for the judgment of this Court.

The ex-Chancellor, who decided the case in equity, expressed the view that the premises in question are devoted to a charitable use, and in this theory this Court entirely concurs. The supervening and single question

is, whether such use can be abrogated by legislative action, and the lands appropriated to other public purposes.

In order properly to apply such legal and equitable principles as are pertinent, it is necessary to comprehend accurately the juncture of events and facts forming the constituents of the problem to be resolved.

This is the situation. The early inhabitants of the section, which for the sake of brevity will be called Newark, organized themselves into a government. They became a regulated community, introducing, by general consent, such regulations and political apparatus as were necessary to the order and well-being of such an establishment. Being thus a government *de facto*, in that capacity they acquired by purchase from the Indians an extensive tract of land, in which was included the premises in dispute. Such acquisition was in part distributed among themselves, in part alienated to new comers and in part devoted to public uses. In the progress of time becoming dissatisfied with their title they applied to the proprietors for its ratification; the result being the making of the conveyance that has given rise to the vexed question in this case. This instrument bears date 10th December, 1696. It is important that its contents should be carefully noted. In the first place it conveys several tracts of land, being allotted as a parsonage; the premises in dispute which are described as being a small tract of land, "Allotted for the burying place;" third, "A triangle piece allotted for a market place;" fourth, "A triangle piece allotted for a training place;" fifth, another "Triangle piece allotted as a watering place for cattle;" and lastly, "The streets of the said town of Newark, as they are now laid out." The town not being incorporated, the conveyance was to four designated townsmen in fee, "To the only proper use, benefit and behoof of the old settlers of the town of Newark, their heirs and assigns forever in

common ; granted to be and remain to and for the several uses herein particularly expressed, and to be appropriated to no other use or uses whatsoever." The instrument is a deed of bargain and sale and is for a valuable consideration.

The deed from the Indians had been taken in the name of five persons, described as "Townsmen and agents of the English inhabitants."

In the year 1713, the inhabitants of Newark were incorporated by Queen Anne, it being recited in this charter by the applicants therefor, "That their ancestors and predecessors, freeholders of the said town, by license from the Proprietors' Governor, in the month of July, 1667, had purchased from the Indians, all that tract of land now known by the name of Newark, &c."

From the foregoing delineation of the title to the lands in question, it seems to be clear that when the deed from the proprietors was taken, the intention was to vest the interest in the entire body of the inhabitants of the town, and not in a particular class of such persons. The recital just extracted from the charter, which is subsequent to the proprietors' deed, plainly expresses this understanding.

The next muniment of title we find in the case is the act of the legislature passed in the year 1804. (*Pamph. L.* 1804, page 255.) This law recited that the inhabitants of the town of Newark purchased all the lands in the bounds of the said town from the Indians ; that they parceled out the same, "At the same time reserving certain portions of land in various parts of said town for public purposes ;" and that doubts having arisen in respect to the Indian title it was thought advisable by the inhabitants of said town of Newark to take a grant from the proprietors ; and that accordingly they took such conveyance, but that "Through the ignorance of those infant times, the use created by the said grant, although really meant and intended for the benefit of the inhabitants of

the said town of Newark and their successors," was so inartificially expressed that the town was embarrassed in asserting its rights in said lands. The statute then proceeds to divert the estate created by the deed of the proprietors, and to transfer it to the inhabitants of the township of Newark and their successors, declaring "That the estate hereby vested in the inhabitants of the township of Newark as aforesaid, shall be appropriated and forever remain to and for the several uses in the said original patent aforesaid expressed, and for no other use or uses whatsoever."

The estate thus acquired by the township became afterwards vested in the city of Newark, by force of the provisions of its charter.

There can be no doubt that the city of Newark has thus become invested with an indefeasible title to these lands, holding the same, at present, subject to the use above defined; for, even on the assumption that the statute passing the title was originally inefficacious and void, the premises have been held openly and continuously under it for over eighty years. The title thus established, therefore, must be deemed indisputable. The city holds the fee of the land as a public burying place, the same being a charitable use.

This being the posture of affairs, the legislature on the 29th day of June, 1886, passed a law whereby it was provided that when lands are held by cities for burial purposes, and are affected by a trust that they shall be devoted to that use, and when in the judgment of the Common Council the public good will be served by devoting such lands to other public uses, it shall be lawful to use such lands for any public purpose for which, in the judgment of the Common Council, they are best adapted. The act further directs that in case interments have been made in such lands, the Common Council shall cause such remains to be removed to some suitable and proper burial

place, and shall make proper provision therefor and for the protection thereof, and to that end may make such reasonable appropriation of public moneys as may be necessary.

The bill charges that by virtue of this statute the Common Council of Newark were proceeding to convert this burying ground into a public market place; and it was that course of action that the late Chancellor, in the decision embraced in the present appeal, enjoined.

From the foregoing statement of the facts the character of the charitable use now in question will be readily understood. It is not a gift of land by a private donor devoting it perpetually to a particular public purpose; nor is it a gift for such an object put in charge of a private corporation; but it is property for such an end, purchased by the public and in the hands of the public. The situation is not unlike that which would occur if any city of the State, by force of appropriate legislation, should purchase out of the public moneys lands to be devoted forever to the use of a public cemetery. The question is, whether the property thus acquired and held by the municipality would be possessed of such a nature as to be under the control of the legislature.

The general principle of law on the subject is, that municipal property is subject to legislative authority. When property is put in trust in the hands of such a corporation, the effect is to prevent the corporation from perverting, at its own will, such property to other uses; but when the uses are public, and not derived from private grant, they are liable to be modified or changed with the concurrence of the law-making power. No case has been found that conflicts with this rule. *Montpelier v. Montpelier*, 29 Vt. 12, which is the only adjudication cited in the opinion read in the Court below, is plainly not in point, for the Court in the decided case, resolved that the statute then in question, properly construed, was not in-

tended to apply to the trust property, and consequently the power of the legislature to deal with such property was not *sub judice*. The Court neither did nor could properly decide whether the trust fund could be turned by statutory authority to other purposes, after declaring that the act under consideration neither had, nor was intended to have such effect.

Nor is it deemed that the cases cited in the brief of the counsel of the appellees are more apt. These are four in number, viz., *Montpelier v. East Montpelier*, 27 Vt. 704; *Dartmouth College v. Woodward*, 4 Wheat. 188; *Harrison v. Bridgeton*, 16 Mass. 16; and *Plymouth v. Jackson*, 15 Penn. 44.

The first of these references has already been commented on; the second seems to be eliminated from the inquiry by a mere advertence to the fact that it relates wholly to the consideration of the subject of the power of the legislature, with regard to the property and franchises of private corporations.

The third citation, that of *Harrison v. Woodward*, seems more akin to the subject; but, as it is considered, it is opposed to the contention in aid of which it is vouched. That controversy related to the division of a town. By the terms of the original grant of the township of Bridgeton, one sixty-fourth of the land granted was required to be appropriated for the support of schools, and a like proportion for the support of the ministry, and they were laid out by the proprietors accordingly. In 1805, the town of Harrison was incorporated, being composed in part of the towns of Bridgeton and Otisfield. By the act of incorporation it was provided, "That all property, rights and credits of the said towns of Otisfield and Bridgeton should be received and enjoyed by the town of Harrison," in certain proportions, and the question was whether a proportionate part of the provision thus made for the ministry passed to the newly created corporation. The

distribution was negatived, but expressly on the ground that the provision for the ministry was not the property of the town, but that it belonged to a particular class as it would vest in the parishes as they came into existence. There was no question made that the lands, or their proceeds, appropriated by the original charter for the support of schools, could be controlled and distributed by the subsequent legislation. There appears to be, with respect to their legal nature and qualities, no difference between a grant of land for the support of schools in a town and the appropriation of land as a municipal graveyard; they are both charitable uses, and if the power could be disposed of by statute, as appears to have been conceded in the case cited, similarly the latter must be subject to the same authority.

The last of the four decisions above named is also alien in principle to the present inquiry; it belongs to a well defined class of cases in which the present one is not included. It presents an instance of property devoted to a charitable use in the hands of a private corporation, and which, consequently, by force of the rule established in the Dartmouth College case, was declared to be impregnable to legislative invasion. There are a number of decisions resting on this basis. The line of demarcation between such cases and those in which the trust property is vested in a municipality, is clearly exemplified by two judgments rendered in the State of Maine. The former of the two is the case of *Yarmouth v. North Yarmouth*, 34 Maine, 411. The general principle on which it was settled was similar to the ratio decided in the Pennsylvania case just referred to, but incidentally it presents a feature instructive with regard to the topic under consideration. The case shows these facts: That the town of North Yarmouth owned a tract of land appropriated to the use of schools, and that the legislature then passed an act incorporating certain persons as trustees of this school fund, and authorizing

them to sell the land, convert the avails into a fund and apply the income forever to the public schools in that town, "Among the districts in proportion to what they pay of town taxes."

It will be noticed that here was an assumption of legislative power over this property while its title was in the municipal corporation; arbitrarily the land was directed to be sold and the benefits of the use to be distributed in a new ratio. So far the legislative action was not deemed questionable, and the case was decided on the supposition that it was a legal exercise of authority. But when the legislature, having thus created a private corporation and placed that property in its keeping, endeavored by a later statute to regulate its distribution, such enactment was pronounced to be void. The Court draws the distinction with respect to legislative interference between a public and private corporation, and declared that these trustees "did not constitute," in the words of the opinion, "a municipal or public corporation, although the object of its creation might have been a public benefit. Their charter was a grant from the State, partaking of the nature of a contract, which they accepted and in which the government had no interest."

The case seems an authority for the proposition that while this property, derived from a public source, was vested in the municipality, it was liable to statutory control, but that when it had passed to a private corporation it was divested of such liability.

The other decision in the same court, is that of *North Yarmouth v. Skillings*, 45 Maine, 133, and arose out of the following state of facts: The proprietors of the lands of North Yarmouth had conveyed to certain persons, their selectmen, "All the flats and mussel beds in said town, lying below high water mark, in behalf of and for the sole use, benefit and behoof of the present inhabitants of said town of North Yarmouth, and of all such as

may or shall forever hereafter inhabit and dwell in the said town, to be by said inhabitants, forever hereafter used, occupied and improved in common," &c.

By an act of the legislature the town of North Yarmouth was divided, and the question was as to the power of the legislature to give, as had been done, to the inhabitants of the new town the use of these flats and mussel beds. The court sustained the law on the broad principle stated by Chancellor KENT, that, "In respect to public corporations which exist only for public purposes, as counties, cities and towns, the legislature, under proper limitations, has a right to change, modify, enlarge or restrain them, securing, however, the property for the uses of those for whom it was purchased."

This case is in express terms discriminated, with respect to its governing principle, from the previous case just cited, the court saying: "That it is very apparent from the reasoning and authorities cited (in that case,) that the court would have come to a different result, if the funds which were attempted to be divided by the legislature had been in the hands of the town, and not in the hands of a board of trustees."

We think the rule applied in this case is the correct one, and that it could never be invoked with more propriety than in the instance now before this Court. This graveyard was obtained by the community for the use of the community; in the deed by which it was conveyed it is associated with other property obviously to be devoted to municipal uses, such as a site for a public market, a training ground and the public streets; and all these several pieces of land have been regarded and treated as the public possessions of the city, for the market place and training ground have long since been converted into parks, and in 1809, it being represented to the legislature that the watering place for cattle embraced in the deed of the proprietors, had not, for many years, been used for the

purposes for which it was originally appropriated, and was not wanted for such use, an act was passed authorizing its sale, and it was sold accordingly by virtue of such authority. In this same vein no act more significant of the opinion prevailing in regard to the nature of these lands could have been exhibited than the act of the legislature enacted in the year 1804, transferring their title from the trustees to the corporate authorities.

It is undeniable, that all these lands comprehended in the proprietors' conveyance have been dealt with by the public authorities for more than a century past, with the assent of all parties in interest, until the filing of the present bill, as though they were property held in the ordinary way by a public corporation for public use. No reason is therefore perceived why the city of Newark should be enjoined from turning this cemetery to the beneficial use in contemplation, by virtue of the sanction of the recent statute.

The principle thus asserted is important, for the opposite view would imperil large public interests and seriously embarrass the municipalities of the State in the management of their property. If it were true as a matter of law, as the Chancellor thought, that this graveyard cannot, even with the assent of the city and of the legislature, be used for any other purpose than that to which it was originally devoted, then the necessary result would be that these other tracts of land embraced in the proprietary grant would be subject to a similar restriction. By force of the prevalence of that theory, the public parks of Newark would be abolished, the one reverting to a market place and the other to a training ground; the city would have in its midst a watering place for cattle, for the sale which has been made of that tract would be plainly illegalized; and none of the original streets, no matter what the necessity, could be narrowed or broadened. And this state of things would continue not for a

year, or a cycle of years, but forever. If a rule of law producing such consequences as these existed, its mischiefs would be equalled only by its unreasonableness.

Nor do we think the decree appealed from should stand, even on the theory that these premises came to the city of Newark by settlement from a private benefactor. Let us assume that the old settlers of Newark, not as a *de facto* government, but as an association of individuals, gave this tract of land to be used by the inhabitants of the city as a burying place forever. What would be the legal result under present circumstances? Such a donation would not be subject to legislative control, for the interest the beneficiaries would acquire under such a grant would be equitable property entitled to the protection of the law. But although the present scheme of converting this tract of land to an alien use, could not be carried into effect by means of a statute which has been enacted for that purpose, in our opinion the same end could and would be reached through the intervention of the court of equity. The case would be presented of a charitable use which, from change of circumstances, cannot be reasonably enjoyed in the mode provided by the settler. In the presence of such a situation, the legal principle is unquestionable; a court of equity will take the matter in charge, changing, when necessary, the nature of the donated property, or regulating the mode of its administration. When the exigency arises a decree will be made that the trust property be sold, as when it has been shown to be desirable to move to a different location a church, hospital or school house. The doctrine is a familiar one.

We think it clear that the present charity, as now conditioned, would fall within the scope of this authority and call for its application. The charity has failed in its main purpose. The design of the donor was to provide a place of burial, not for one or two generations, of the inhabitants of this city, but for all future generations.

But this cemetery has long since ceased to be used as a place of sepulture ; such a use of it has been and is now forbidden by law. It is a cemetery of the past ; a place where the bodies of a bygone generation repose. The question would be whether this tract of land should be for all time to come devoted to this limited use. Such, obviously, was not the intention of the donor. The inhabitants of the city who are the beneficiaries of the charity, through their duly constituted authorities, would stand before the Court showing that the devotion of the land to its present purpose is, taken as a whole, not a benefit, but a serious detriment to the public ; and that it is reasonable to remove the bodies in this yard to a more suitable place to be provided out of the city treasury, and thus effectuate that part of this charity that only is susceptible of being carried out. It is not perceived on what ground a court of equity could refuse to accede to such a prayer ; for it does not seem possible that any reasonable person would say that this tract of land, in the most populous part of a large city, should be permitted to remain for all future time devoted merely to its present use ; for to say this would, in effect, be to maintain that a charity will be so carried into effect as to work an injury to its beneficiaries. It seems to us plain that under the conditions presented, the Chancellor, if he had been properly applied to, would have been bound to permit the designed transmutation of this property.

And if this be so, then the injunction should not have issued, for the Court will not enjoin the act of a trustee of a charitable use which itself would have directed to be done had the case been before it. Such a trustee may alienate the trust property, but he will do such act at the peril of his conduct being disapproved of by the Court of Chancery. On this head the case of the *Attorney-General v. South Sea Company*, 14 Beav. 453, is an illustration. Eight messages were conveyed to trustees, the

rents to be applied, by way of certain charitable uses, for the poor of the parish. The trustees leased these properties for ninety-nine years to the South Sea Company, and this was complained of as a breach of trust. But Lord LANGDALE, defining the power and duty of a trustee of this class, says: "It is plain that in ordinary cases a most important part of this duty is to preserve the property, but it may happen that the purposes of the charity may be best sustained and promoted by alienating the specific property. The law has not forbidden the alienation, and this court upon various occasions, with a view to promote the permanent interests of charities, has not thought it necessary to preserve the property in specie, but has sanctioned its alienation." And after remarking that the trustees may do, at their own risk, what the Court would have done under the circumstances, and deeming the alienation made by the trustees, on the whole, beneficial, he dismissed the bill.

This we think should have been the course in the present case; the Chancellor, even on the theory adopted by him that this charity was not subject to legislative control, should not have enjoined the municipal authorities from doing the act contemplated by them, inasmuch as if the case had been before him, he would have been constrained, by the force of a principle of equity that is not open to question, to have directed the doing of this same act.

The decree must be reversed and the bill directed to be dismissed, but under the circumstances, without costs in either Court.

The Indian Bill of Sale to the Newarke Men.

Entered 2d March, 1676-7. [E. J. Records, Lib. 1, fol. 69.]











Know all men By these presents, that WEE, Wapamuck the Sakamaker, and Wamesane, Peter, Captamin, Wecaprokikan, Napeam, Perawae, Sessom, Mamustome, Cacanakque, and Hairish, Indians belonging now to Hakinsack, the known acknowledged proprietors of a certain tract of Land Lying on the West of Pesayak river being parties on the one Side, and Mr. Obediah Bruen, Mr. Samuel Kitchell, Michael Tomkins, John Browne, and Robert Denison, with the consent and advice of Capt'n Philip Carteret, Gouverneur of the Province of New Jersey, and in the behalf of y^e Inhabitants now being or to be y^e possessors of the Tract of Land Inserted in this Deed of Sale the other parties, Doe make this Indenture the eleventh day of July in the year of our Lord 1667 (being the enlarging and perfecting of a deed of Sale made With the Indians the year before the present) in manner and form following, viz :

THAT WEE, the said Wapamuck the Sakamaker, and Wamesane, Peter, Captamin, Wecaprokikan, Napeam, Perawae, Sessom, Mamustome, Cacanakque, and Harish, doe, for ourselves and With Consent of the Indians, Bargain, sell and deliver, a Certain tract of Land, Upland, and Meadows of all sorts, Wether Swamps, Rivers, Brooks, Springs, fishings, Trees of all sorts, Quarries and Mines, or Metals of what sort soever, With full liberty of hunting and fouling upon the same, Excepting Liberty of hunting for the above said proprietors that were uppon the upper commons, and of fishing in the above said Pesayak River ; which said tract of Land is bounded and Limited with

the bay Eastward, and the great River Pesayak Northward, the great Creke or River in the meadow running to the head of the Cove, and from thence bareing a West Line for the South bounds, wh. said Great Creke is Commonly Called and known by the name Weequachick, on the West Line backwards in the Country to the foot of the great mountaine called Watchung, being as is Judged about seven or Eight miles from Pesayak towne; the said Mountaine as Wee are Informed hath one branch of Elizabeth towne river running near the above said foot of the mountaine; the bounds northerly, viz. Pesayak River reaches to the Third River above the towne, y^e River is call Yauntakah, and from thence upon a north-west line to the aforesaid mountaine; all which before mentioned Lands for the several kinds of them, and all the singular benefits and Priviledges belonging to them, with y^e several bounds affixed and expressed herein, as also free liberty and range for Cattle, horses, hoggs, and that though they Range beyond any of the bounds in this deed Expressed, to feed and pasture Without Molestation of or damage to the owners of the cattle &c. above said. WEE the above said Indians, Wapamuk, &c. doe sell, Alienate, make over and Confirm all our Right, Title and Interest of us, our heirs, and Successors forever Unto the said Lands, &c., as above mentioned to Mr. Obediah Bruen, Mr. Samuel Kitchell, Michael Tomkins, John Browne and Robert Denison, townsmen and Agents for y^e English Inhabitants of Pesayak, to them, their heirs and associates for Ever, to have, hold, and dispose of, Without Claim, Let, or Molestation from ourselves or any other Whatsoever. These Lands, &c. are thus solde and delivered for and in consideration of fifty double-hands of powder, one hundred barrs of lead, twenty Axes, twenty Coates, ten guns, twenty pistols, ten kettles, ten Swords, four blankets, four barreles of beere, ten paire of breeches, fifty knives, twenty howes, eight hundred and fifty fathem

of wampem, two Ankors of Licquers or something Equivolent, and three troopers Coates ; these things are received, only a small remainder Engaged to them by bill. To the true and just performance according to y^e true intent of our Bargain, WEE y^e said Obediah Bruen, and the rest above said, doe for ourselves and heirs, Ex'tors, Adm'n'tors or Assigns, to the said Wapamuk, &c., the true proprietors of the said Lands doe bind and Covenant. WEE the said Wapamuk and the rest of the Indians above said doe fully surrender, pas over and Yeild up all our Right, privilege and power in the same, and to free the above said Lands from Claim, Incumbrances, of What kind soever ; all the above mentioned purchase Wee doe Grant and deliver to Obediah Bruen and y^e rest above said, to them, their associates, heirs, and all the lawfull possessors. And for the full Ratiffication and testification of the above said bargain and agreements about the aforesaid tract and parcells of Land so bounded, Wee, the said parties above mentioned have hereunto Enterchangeably sett our hands and seals, the day and year above said, in the presence of Us Witnessing. Moreover Wee doe grant them free liberty to take what timber and stones they please in any of our Lands, where Wee the above said Indians have yet propriety.

OBEDIAH BRUEN,
MICHAEL TOMKINS,
SAMUEL KITCHELL,
JOHN BROWNE,
BOBERT DENISON.

WAPAMUK,		his marke.
HARISH,		his marke.
CAPTAMIN,		his marke.
MAMUSTOME,		his marke.
PETER,		his marke.
WAMESANE,		his marke.
WEKAPROKIKAN,		his marke.
CACANAKRUE,		his marke.
SESSOM,		his marke.
PERAWAE,		his marke.

Signed, sealed and delivered in presence of

SAMUEL EDSSALL,

PIERWIM, y^e Sachum of Pau, X his marke.

EDWARD BURROWES,

mark of **R** RICHARD FLETCHER,

CLASSE X his marke.



Indian Deed of Sale and Confirmation to the Towne of Newark.

Entered 18th March. [E. J. Records, Lib. 1, fol. 107.]

WEREAS in the original deed of sale make by the Indians to the inhabitants of the town of Newark, bareing date the ellevent day of July, 1667, it is said to the foot of the Great Mountaine, called Watchung, alias Atchunck, WEE Winocksop and Shenocktos, Indians and owners of the said Great Mountaine, for and in consideration of two Guns, three Coates, and thirteen kans of Rum, to us in hand paid the receipt Wereof wee doe hereby acknowledge, doe Covenant and declare to and with Mr. John Ward and Mr. Thomas Johnson, Justices of the peace of said towne of Newark, before the Right Hon'ble Phillip Carteret, Esq., Gouverneur of the Province of New Jersey, and the other witnesses here under written, that it is meant, agreed, and intended that their bounds shall reach or goe to the top of the said Great Mountaine, and that WEE the said Indians will marke out the same to remain to them the said inhabitants of Newark, their heires or Assignes for Ever. In Witness hereof WEE the s'd Indians have hereunto sett our hands and Seales the 13th of March, 1677-8.

WINOCKSOP,  his marke. [SIGIL.]

SHENOCKTOS,  his marke. [SIGIL.]

Signed, sealed and Delivered in the presence of
JAMES BOLLEN, Secretary,
HENDRICK DROGESTRADT,
SAMUEL HARISSON.

This acknowledged before me the day and yeare above written.

PH. CARTARETT.

Deed from the Proprietors.

[E. J. Records, Lib. F, fol. 166-168.]

THE PROPRIETORS of the Province of EAST NEW JERSEY, To all persones to whome these presents shall come GREETING. Know ye, that WEE the sayd Proprietors for and in consideration of the Rents and services herein After Reserved and for severall other good causes and considerationes us hereunto moving, HAVE Given, granted, bargained and sold, And by these presents Do grant, give, bargain and sell unto John Curtis, John Treat, Theophilus Peirson and Robert Yong, all of the Towne of Newark in the countie of Essex and Province afore sayd, ALL those severall Tracts of Land and meadow hereafter Expressed, scituate, Lyeing and being within the sayd Towneship of Newark :

1st. A Home Lott, In Length tenn chaines, in breadth at the east and middle three chaines Lack six foot And att the west end foure chaine and three quarters of A Chaine ; bounded North by John Johnson, south by Daniel Browne, east and west by high wayes.

ALSO A tract Lyeing Above Daniell Dods Home lott BEGINING at Daniel Dodd's South-west corner, thence runing North at the East End twenty Eight chaines to the highway ; thence as the highway runes twentie six chaines to the branch of the Mill Brooke ; thence Along the Brooke seaven chaines at the west End to Samuell Huntington's line ; bounded west by the sayd branch, North by the highway, East by Hance Alberts, Samuel and Daniel Dod, and by the other Lotts South.

Another tract beyond the Mill brooke branch BEGINING At A Chestnut tree markt on foure sides which is John Ward's corner ; thence runing north west Seventeene chaines to a maple tree markt as before at the

swamp side ; thence south and by west seventy to another tree markt as before ; thence East and by south twentie chaines to Mr. Crane's corner, bounded North by Land unsurveyed, East by other Lotts, west by the Swamp and fresh meadows, south by other Lotts.

ALSO a peece of meadow at the Lower tide pond, in Length seaventeene chaines, In breadth seaven chaines, bounded east by the creeke that runs into the tide pond, south by Hugh Roberts and Thomas Staples', north by the Pond, west by Oyster Creeke.

ALSO a peece of swamp Lying at the Great Swamp in the Neck, begining at the Bogg [*bridge*, in the survey,] and runing in Length twentie chaines north, and at the south end fifteen chaines, bounded south by the bridge, east by the boggs, west by other Lotts.

ALSO another peece of meadow at the head of the Great Meadow, BEGINING at Samuel Potter's South west corner And running North twentie chaines in breadth to Aaron Blackley's line, in length twenty chains, bounded east by Samuel Potter, north by Aaron Blackley and John Johnson, west by the swamp, south by Eliezer Lampson and unsurveyed Land ; containing in all the above said tracts of upland and meadow (after allowances for barrens, highways, &c.) two hundred acres, being allotted for the parsonage.

2dly. All that small tract allotted for the bureing place, taking in the Pond and meeting house, being seaven chaines in Length and foure chaines in breadth, bounded west by John Treat, south by John Johnson, North and East by Highways.

3dly. A triangle peece aloted for a Markett place, six chaines wide at the south end, on the west side nine chaines in length, and on the east side eleven chaines in length, bounded on all sides by highways.

4thly. Another triangle peece allotted for a training place, in length on the west side seaventeen chaines, on

the south-east side fifteen chaines, and on the east end seaven chaines and a halfe, bounded on all sides by Highways.

5thly. Another triangle peece Alotted for a watering place for cattle, Begining at John Plum's corner and running up the brooke west seaven chaines, thence east and by north seaven chaines to the highway, and at the east end one chaine three rodes; bounded south by John Plum, and Robert Daglish, North and East by highways.

And lastly, the streets of the sayd towne of Newarke, as they are now layed out, viz: the high street to remaine about two chaines more or less in breadth, and in length from Hugh Roberts' brooke to the mill brooke thorow the Middle of the Towne; and the rest of the streets to bee as they are now in breadth; TOGETHER with all and all manner of rivers, rivolets, springs, runes, streames, Dams, feedings, Pastures, woodes, under woodes, trees, waters, water courses, water falls, ponds, poolls, pitts, meadows, easements, profits, commodities, liberties, advantages, Emoluments and Appurtenances whatever to the same belonging or any manner of ways appertaining; TO HAVE AND TO HOLD the said several tracts of upland, meadows and premises with their and every of their appurtenances to them the sayd John Curtis, John Treat, Theophilus Peirson and Robert Yong their heires and Assignes forever; to the only proper use, benefit and behoof of the Old Setlers of the towne of Newark aforesaid, their heires and Assignes forever, In Com'on; granted to bee and Remaine to and for the several uses herein particularly expressed, and to be appropriated for no other use or uses whatsoever; To bee Holden in free and com'on soccage of us the sayd Proprietors, our heires and Assignes forever As of the seignorie of East Greenwich; YEELDING and paying therefor unto us the Proprietors, our heires and Assignes forever, sixpence sterling monie of England, for the aforesaid several tracts of Land on

every five and twentieth day of March forever hereafter, in Leiu and instead of all other services and demands whatsoever.

IN WITNESS whereof WEE HAVE caused the seale of our sayd Province to be hereunto affixed, and the same to be signed by our Governour and the Major part of his Council for the time being this tenth day of December, Anno Dom. 1696, and in the eight yeare of the Raigne of our soveraigne Lord, William the Third, over England, &c., KING.



AND. HAMILTON,
JOHN INIANS,
SAMUEL DENNIS,
JOHN BISHOP,
JAMES DUNDAS,
JOHN ROYSE.

“Town Pattent or Charter.”

[E. J. Records, Lib. A. A. A., fol. 145.]

ANNE, by the Grace of God Queen of Great Brittain, ffraunce and Ireland, Defender of y^e faith &c. To all to whome These Presents Shall Come or may in any wise Concern Sendeth Greeting. Whereas, our Loveing Subjects John Treat, Joseph Harison, Eliphelet Johnson, John Cooper, and John Morris, freeholders and Inhabitants of y^e Town of Newark in y^e County of Essex in our Province of New Jersey, on behalf of themselves and the Rest of y^e freeholders of y^e said Town and by their order, by their Humble Petition Presented to our Trusty and well Beloved Robert Hunter Esq'r Captain General and Governour in Cheife of our Said Province, have Sett forth, that their Ancestors and Predecessors, freeholders of y^e said Town, by License from y^e Proprietors, Governour, in y^e Month of July one Thousand Six Hundred Sixty Seven, had Purchased from y^e Indians, all that Tract of Land now Known by y^e Name of Newarke, Bounded Easterly by a Great Creek that Runs from Hackingsack Bay through y^e Salt Meadow Called by the Indians Wequahick, and now Known by y^e Name of bound Creek: and Continuing from the head of y^e Said Creek to the head of a Cove to a Markt Tree, from thence it Extended Westerly upon a Straight Line, by Computation Seven Miles be the Same more or Less to the End or foot of the Great Mountain and to the Ridge thereof Called by the Indians Wachung, Near where Runs a branch of Raway River, from thence Extending on a northerly Course along the Ridge of the Said Mountain to a heap of Stones, Erected to Asertain the Boundary between the s'd Town of Newark and the Town of Achquickatnuck, from thence Running a South East Course by Achquickatnuck Bound

Line, to where the brook or Rivolet Called by the Indians Yantokah, but now Known by the Name of the Third River, Emtieth itself into Pasayack River and from thence Continuing Down along by the said Pasaiaack River and Hackingsack Bay to the mouth of the said Bound Creek: and that for want of a Charter or Pattent of Incorporation they are under Sundry Inconviences and Disorders, which to prevent for y^e future they have therefore Prayed our Charter or Pattent of Privilidges accordingly: which Request we being willing to Grant. KNOW YEE, that of our Especiall Grace, Certain Knowledge, and Mear Motion, WE have Given, Granted, Rattified, and Confirmed, and Do by these Presents, for us, our heirs, and Successors for Ever, Give, Grant, Ratife, and Confirm unto John Treat, Joseph Harison, James Notman, Eliphelet Johnson, John Cooper, John Morris, Joseph Crane, Thomas Davis, Nathaniel Wheeler, and George Harison, in Trust to and for themselves and y^e Rest of y^e freeholders and Inhabitants of y^e said Town and their Successors for Ever, within the Limits and Bounds aforesaid, the free Liberty and Privillidge of being a Town Ship, and They and their Successors for Ever hereafter are and Shall be a Comunity or Township, in Deed and in Name, in the said County of Essex, within our Said Province of New Jersey, by the Name of the Trustees of the freeholders and Inhabitants of the Township of Newark, AND that they and their Successors for Ever hereafter Shall have a Perpetuall Succession of the Number of Ten, Principle freeholders and Inhabitants of the s'd Township of Newark, who shall be the Trustees of the Freeholders and Inhabitants of the Township of Newark for Ever, (That is to say) that upon y^e Death of any one or more of the said Trustees, it Shall and may be Lawful for the freeholders of the said Township for the Time being, being therunto Sumoned or Warned by the Constable or Constables of the said Town for the Time

being, by order of the Surviving Trustees of the said Township of Newark for the time being, or the Major part of them, and by other Publick wayes and Meanes, to Assemble and meet together, at Such time and Publick Place within y^e said Township as the s'd Surviveing Trustees for the time being, or the Major part of them from time to time as Need shall be shall think fitt to Nominate and appoint, and there by Majority of votes of the said freeholders, to Elect and Choose so many of y^e Principle freeholders of the said Township Resideing within y^e Bounds of the said Township as may fill up the Number of the s'd Trustees to be Ten, which Trustees so Chosen and Elected as aforesaid, together with the Surviving Trustees for the time being, Shall be Trustees of the Said Township to all Intents and Purposes as Much as if they had been particularly Nominated and Expressed in this our Said Grant. AND WE DO further Give and Grant unto the said Trustees and their Successors for Ever, that it shall and may be Lawful to and for y^e said Trustees and their Successors for Ever, by y^e Name of the Trustees of the freeholders and Inhabitants of y^e Township of Newark, In any of our Courts within Said Province of New Jersey to Sue and be Sued, Answer and be Answered unto, Defend and be Defended. AND WE DO further Give and Grant unto the said Trustees and their Successors for Ever hereafter, and to the Major part of them, full Power and Lawful Authority once in Every Year at their Discretion, to Summons and Call together the freeholders of the said Township, and for the said freeholders and their Successors so Summoned and Called together, to assemble and meet on Such Certain Day and at such place as the said Trustees for y^e time being or the Major part of them shall appoint, to Elect and Choose by Plurallity of Votes of the said freeholders and their Successors, Such Number of the Said freeholders and their successors as they shall think fit, Not Exceeding five,

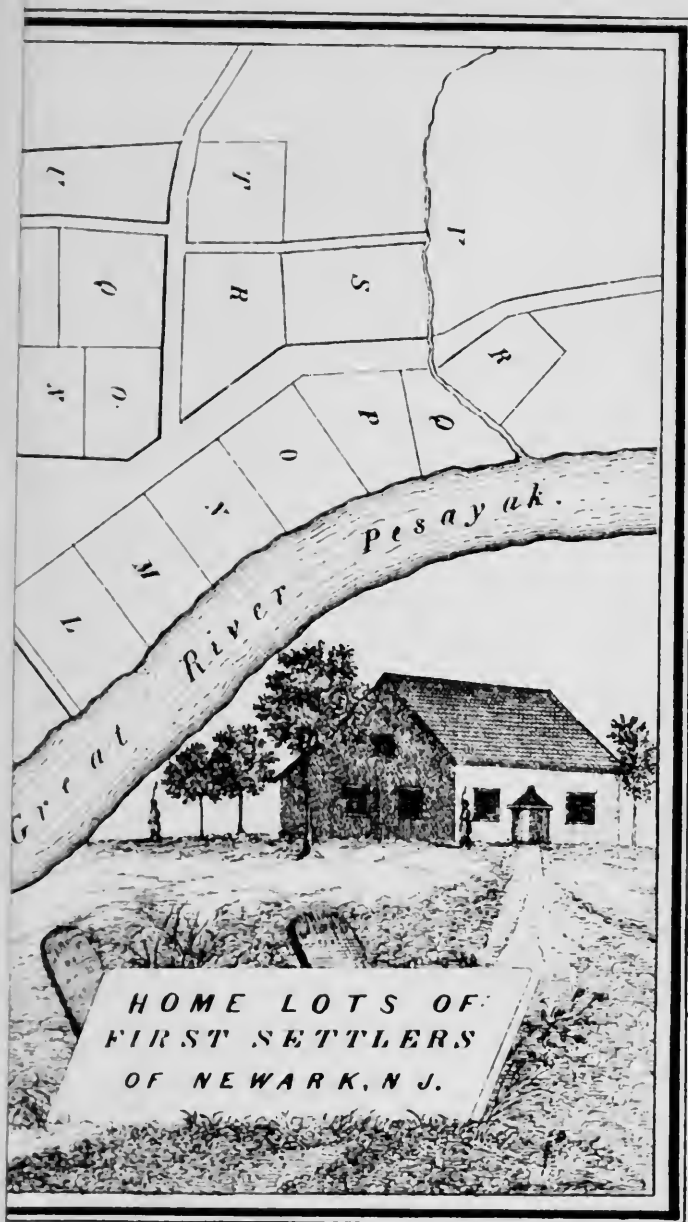
to be Overseers for appointing what Improvement Shall be Made for the Ensuing Year upon a Certain Neck of Land within the Bounds of the said Township, which by Reason of its Scituation and Natural advantages is or May be Easily Enclosed by a Generall fence, and for apportionateing to Each of the said freeholders Interested in the Said Neck, and their Successors for the time being, their Share of y^e Charge of the Said Generall fence for the Common Good, which s^d apportionateing So made as afores^d shall be of force against Each of y^e Said freeholders and their Successors for the time being for their Respective Shares or Portions of the said Charge their Executors, administrators or assigns, for so Long time as the said Trustees and their Successors or y^e Majority of them shall think fitt and no Longer, and in Case of Refusall or neglect to Pay y^e Same, it shall and may be Levied by y^e Constables of the said Town or any one of them, by warrant from a Justice of the Peace within the said Township by Distress, and by the said Constables or Constable to be paid into the said overseers for y^e time being, for the use aforesaid and no other use whatsoever. AND WE DO further Give and Grant to the said Trustees and their Successors for Ever, that it shall and may be Lawful for y^e freeholders and Inhabitants of y^e said Town, Annually and once in Every Year, to Assemble and meet together and to Choose Two Constables, one overseer of y^e Poor, and one overseer of y^e highwaies, by Majority of the Votes of the ffreeholders and Inhabitants of the s^d town of Newark, which Constable and overseer so Chosen as aforesaid Shall Serve in the said Respective Offices in the said Town untill the Next Anuall Election, if they so Long Live, or Pay the Sum of five Pounds for the use of the poor of Said Town, AND that in Case of Death or Refusall of any of the said Officers to serve in any of the said Offices as often as the Same Shall Happen out of the Useuall Anniversary time of Election, that it shall and

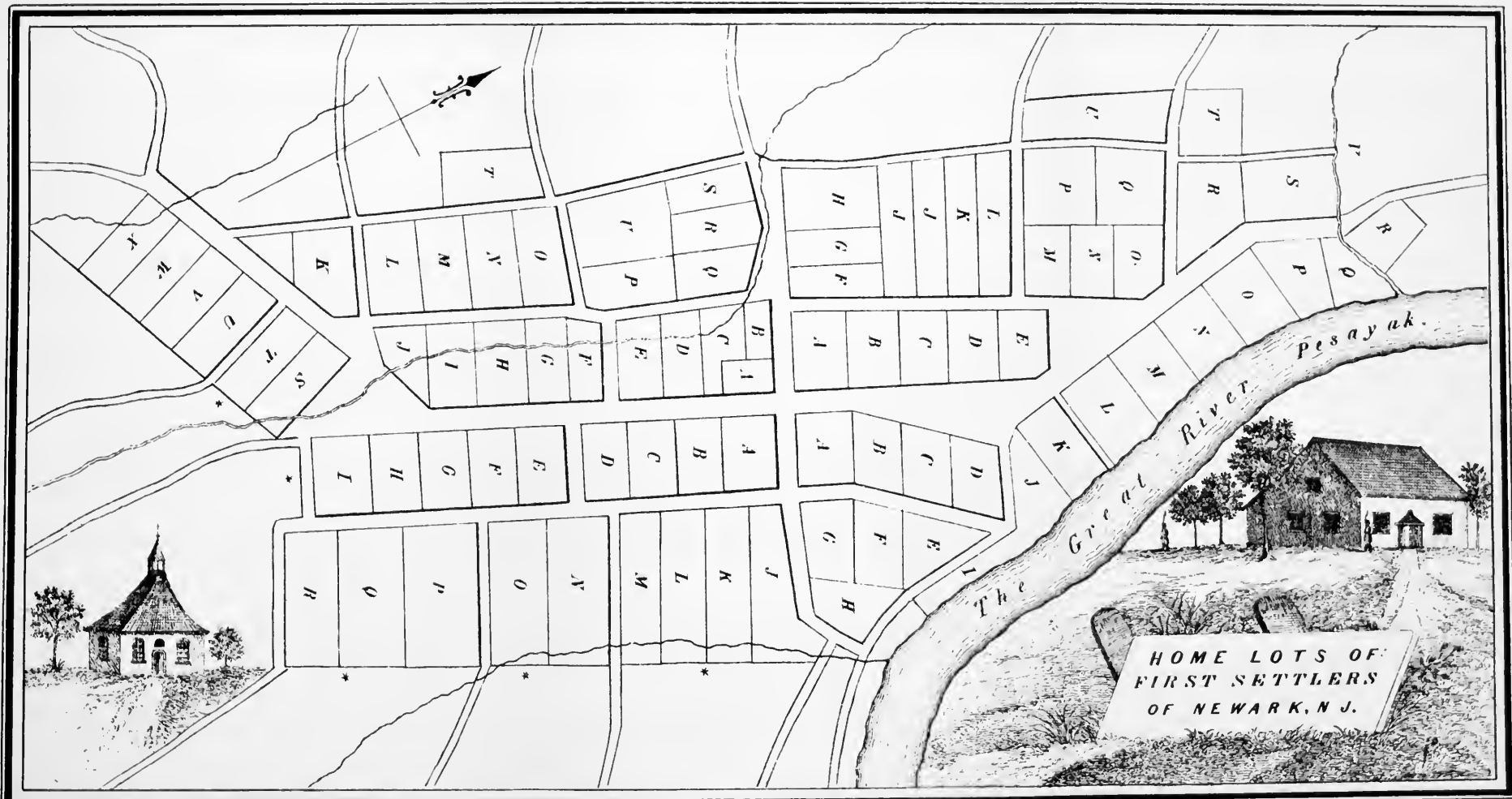
may be Lawful for the said freeholders and Inhabitants to assemble, and meet together to Choose others in their Room and place, and it shall and may be Lawful for a Justice of the peace within the said Township to administer an oath to the Said Officers of the said Town, for the faithful Discharge of their Respective Offices. AND WE DO further Give and Grant to the said Trustees and their Successors all other Privillidges, Rights, Liberties and Immunities that the Township of AMWELL or any other Township within our s'd Province of New Jersey Doth or may of Right Enjoy. TO HAVE, HOLD AND ENJOY all and Singular the Privilidges, Rights, Liberties, and Immunities aforesaid, unto the said John Treat, Joseph Harison, James Notman, Eliphelet Johnson, John Cooper, John Morris, Joseph Crane, Thomas Davis, Nathaniel Wheeller, and George Harison, Trustees of the freeholders and Inhabitants of the Township of Newark and their Successors for Ever; they y^e s'd Trustees and their Successors for Ever Yeilding, Rendering, and Paying unto us, our heires and successores, Yearly and Every Year, on the feast Day of the ANNUNCIATION of the Blessed Virgin Mary, as an acknowledgment for the Said Privilidges, the ANNUAL Rent of five Shillings, In Leiu and Stead of all other Rents, Services, and Demands whatsoever for the same.

In testimony whereof, we have Caused these our Letters To be made Pattent, and y^e Seall of our Province of New Jersey to be affixed. Wittness our said Right Trusty and well beloved Robert Hunter, Esqr, Captain General and Governour In Cheiffe of the Provinces of New Jersey and New York, and the Teritories and Tracts of Land Depending thereon in America, and Vice Admirall of the Same &c. at fort ANNE In New York, this Twenty Seventh Day of Apreill, in the Twelfth Year of our Reign, ANNOQE DOM, 1713.

[L. S.]

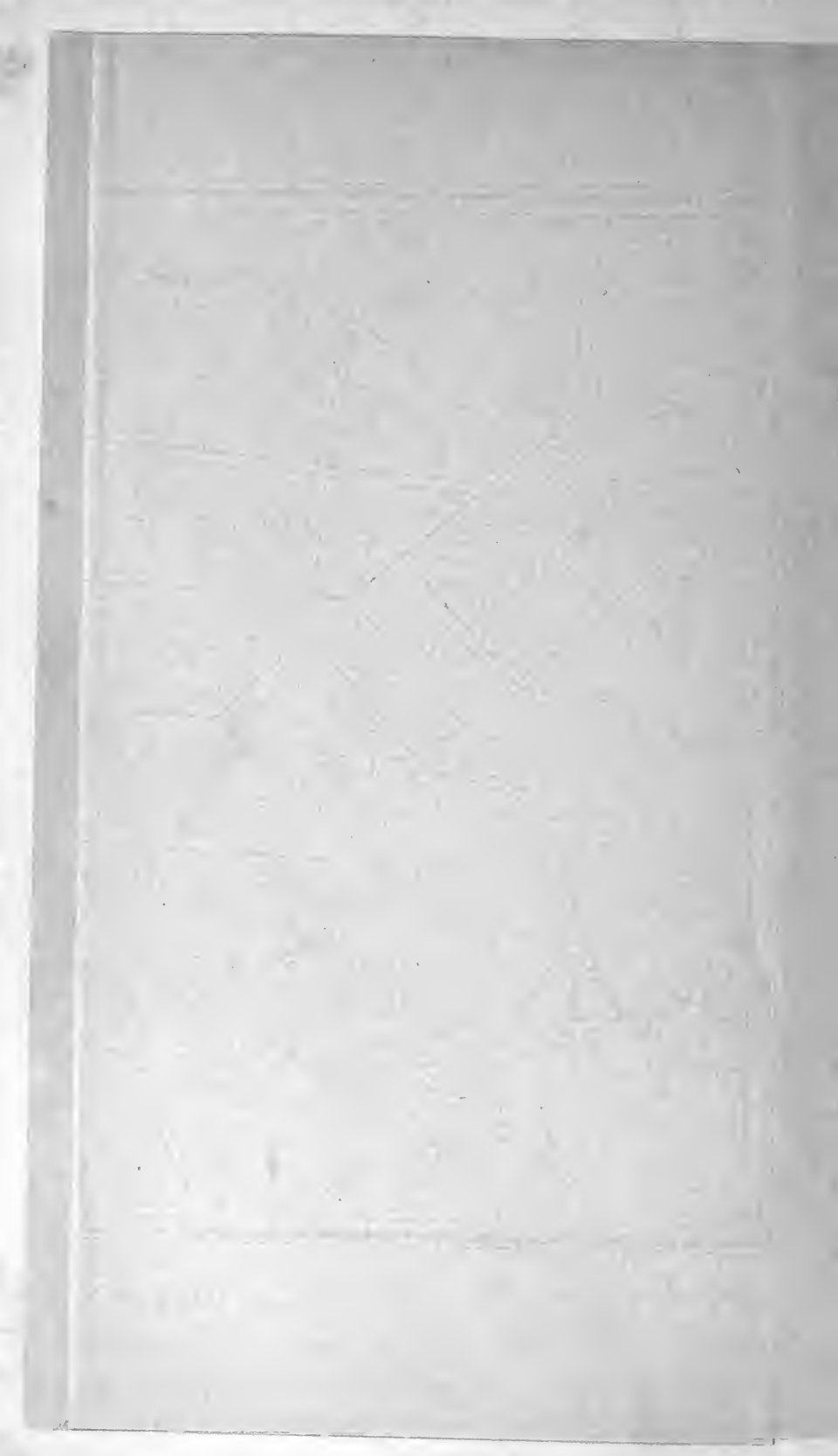
J. BASSE, Secretary.





S. H. Conyar, del.

NEWORKE OR PESAYAK TOWNE, — 1666 — 1680.



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